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RECENT DEVELOPMENTS IN THE DOCTRINE OF CONSIDERATION

In the law, as in everything else, it is a good thing to take stock from time to time and to see how things stand. That is what it is proposed to do in this article—to see how things stand at present in regard to the doctrine of consideration. It has certainly been much modified of late and the question is sometimes asked how far it remains an essential element of our law of contract. It is here proposed to consider, first, its place in the formation of contract, and secondly, its place in the modification or discharge of contract. Let us put aside the common bilateral contract—a promise for a promise—because there is rarely any difficulty about consideration there. Each promise is the consideration for the other. Let us consider only the common unilateral contract—a promise for an act—because that is where the difficulties arise.

The purpose of this article is to suggest that, both in the formation and in the discharge of contract, while keeping the doctrine of consideration, we are tending to regard any act done on the faith of the promise as sufficient consideration to support it, even though the act done is no benefit to the promisor and no detriment to the promisee.

I. The Formation of Contract

The law for centuries has been that an act done at the request of another, express or implied, is sufficient consideration to support a promise. See the notes to *Lampleigh* v. *Braithwait* (1616) 1 Sm.L.C. 148; *Osborne* v. *Rogers*, 1 Wms.Saund. 264. Modern developments show that the promise must be intended to create legal relations (*Rose and Frank* v. *Crompton* [1923] 2 K.B. at pp. 288, 293); and that a request will be implied whenever it can be inferred that the promisor intended that his promise should induce the other to do some act or forbearance on the faith of it: *Crears* v. *Hunter* (1887) 19 Q.B.D. 341. Thus when a man promises to give security for an existing debt, on the faith of which the creditor forbears to sue for it, the law will imply a request for forbearance. It is not necessary that the creditor should make any promise to forbear. The mere fact of forbearance is good consideration: *Alliance Bank, Ltd.* v. *Broom* (1864) 2 Dr. & Sm. 289; *Wigan's Case* [1909] 1 Ch. 287. The only essentials are the

promise by the one and the forbearance by the other on the faith of it. Even though there was no request in fact for the forbearance, nevertheless if the promise was given with the intention of inducing the creditor to forbear on the faith of it, the law will imply a request: *Glegg* v. *Bromley* [1912] 3 K.B. 474; *Re Wethered* [1926] 1 Ch. 167. In these circumstances it may be well that, instead of using the old language of "request" and "consideration" we can express the self-same principle by saying that a promise is binding in law if it was intended to create legal relations, intended to be acted upon and was in fact acted upon by the person to whom it was given. Intention in this connection should, of course, be judged objectively and not subjectively. The promisor should be taken to intend what a reasonable man receiving the promise would believe him to intend. In the cases on forbearance, it is usually plain that when a man promises to give security for a debt, he intends that the creditor should forbear. In those cases the promise is binding when it has been acted upon, but not otherwise: *Oliver* v. *Davis* [1949] 2 K.B. 727. But there are some cases when the giving of a promise does not import a request to do anything, and does not convey an intention that it should be acted upon. A good illustration is given by the recent case of *Combe* v. *Combe* [1951] 2 K.B. 215. A wife who had obtained a decree against her husband asked what amount he would pay her by way of permanent maintenance. He said he would pay her £100 a year free of tax. The Court of Appeal held that that did not mean that she should forbear from applying for maintenance. It is well known that agreements of that kind are made as a preliminary to an application for maintenance. They form the basis for a consent order to be approved by the court. The agreement, therefore, so far from being an implied request to forbear from applying to the court, was almost an invitation to her to apply to the court. Her forbearance was therefore no consideration.[1]

The other modern development is the gradual disregard of "benefit" and "detriment." In former times the act done, in order to be good consideration, had to be a benefit to the promisor or a detriment to the promisee. Those phrases were historically intelligible. "Benefit" conveyed the notion of a *quid pro quo*. "Detriment" conveyed the tortious origin of the action of the assumpsit. But nowadays there are some grounds for suggesting that an act may be good consideration even though it is not a benefit to the promisor nor a detriment to the promisee. If a man promises a charitable institution that he will pay £100 into its funds if it procures nine other persons to do the same, justice requires that his promise should be held to be binding on him as soon as it has procured the nine others to pay £100 each; but the

[1] It is suggested in a recent note that this explanation was not a "rational explanation," see 67 L.Q.R., at p. 458.

act done by the institution is not a benefit to him nor a detriment to the institution. If a man promises to pay a friend of his £100 if the friend marries the lady to whom he is engaged, then the promise is binding on the promisor as soon as the friend marries the lady, even though the marriage is no detriment to the friend and no benefit to the promisor. There is no modern case to this effect but the old cases of *Shadwell* v. *Shadwell* (1860) 9 C.B. (N.S.) 159; *Scotson* v. *Pegg* (1861) 6 H. & N. 295; *Chichester* v. *Cobb* (1866) 14 L.T. 433 were certainly correct decisions; and it is suggested that the most satisfactory explanation of them is that an act done is good consideration even though it is no benefit to the promisor and no detriment to the promisee. This new conception of consideration may have an important bearing on the vexed question of a promise to keep an offer open for a fixed time on the faith of which the option-holder acts. The act done may be good consideration even though it is no benefit to the promisor.

II. The Modification or Discharge of a Contract

The law for centuries has been that a promise to waive, modify or discharge the strict terms of a contract needs to be supported by consideration just the same as any other promise. In former times no one saw any distinction between a promise given in formation of a contract and a promise given in discharge of a contract. It was Sir Frederick Pollock who first pointed it out in his book on contracts (12th ed., at p. 142), when he said : "The doctrine of consideration has been extended, with not very happy results, beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts." Once attention is drawn to it, however, it becomes obvious that the two things are in fact quite different. There is a new factor present in the modification or discharge of a contract which does not occur on the formation of a contract. That new factor is that each party is already bound in law to perform his part of the existing contract; and it is that very factor which has caused all the trouble about consideration. It was often used by the common lawyers so as to deny the existence of consideration and hence to deny the validity of the promise. They said that if the promisee merely did that which he was already bound to do—or less than he was already bound to do—that was no sufficient consideration to support a new promise. There was no satisfaction —no benefit—to the promisor in receiving what he was already entitled to; and there was no detriment to the promisee in doing what he was already bound to do. This was their reason for saying that, when an ascertained sum is already due under a contract, payment of a less sum is no consideration for a promise to forgo the remainder : *Pinnel's Case* (1602) 5 Co.Rep. 117a. Likewise they said that when a seller, who is already bound by a

contract to deliver by a certain date, afterwards requests the buyer to extend the time, then a promise by the buyer to accept delivery at a later date is not binding on him because the seller has given no consideration for that promise: *Plevins* v. *Downing* (1876) 1 C.P.D. 220. Such reasoning received the sanction of the House of Lords in *Foakes* v. *Beer* (1884) 9 App.Cas. 605; and must still be applied in determining the strict legal rights of the parties.

But strict legal rights are always capable of being modified by the interposition of equity; and that is what has happened in the discharge of contracts. The courts have repeatedly invoked equitable principles so as to neutralise ill effects of the common law doctrine of consideration. They have not done so in the formation of contract, because there was no necessity there for the intervention of equity. They have only done so in the modification or discharge of contracts. The principle of equity was stated by Lord Cairns in the House of Lords in *Hughes* v. *Metropolitan Ry.* (1877) 2 App. Cas. 439, and explained by Bowen L.J. in *Birmingham and District Land* v. *L. & N. W. Ry.* (1888) 40 Ch.D. 268. Taking the two judgments together, this is the principle: it is the first principle upon which the courts of equity proceed, that if the parties who have entered into definite and distinct legal terms involving certain legal rights, afterwards by their own act or with their own consent, enter upon a course of negotiation or otherwise so conduct themselves as to induce one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the persons who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable, having regard to the dealings which have thus taken place between the parties. (Estoppel

There are several things to be noticed about this principle:

First, it applies only to parties who have already "entered into definite and distinct legal terms." It applies therefore only to parties who have already entered into a contract, not to those about to enter into one. It can only apply therefore to the modification or discharge of an existing contract, not to the formation of a new contract.

Secondly, it extends to any conduct which induces the other party to believe that the strict rights under the contract "will not be enforced or will be kept in suspense." The conduct is not confined to promises. It is any conduct. But it certainly includes promises. The most emphatic conduct of all is a deliberate promise not to enforce the rights or to keep them in suspense. Such a promise is clearly sufficient to bring the principle into play.

Thirdly, in seeing whether a party will be allowed to enforce his strict rights, the criterion is whether it would be "inequitable having regard to the dealings which have taken place between the parties." That means that, in cases where the conduct consists

of a deliberate promise not to enforce his rights, the criterion is, not whether there is any consideration for the promise, but whether it is " inequitable " that he should be allowed to go back on it.

The result is, therefore, that, so far as concerns promises to waive, modify or discharge the strict legal rights arising under a contract, there is a conflict between the rules of common law and the rules of equity. Common law requires the promise to be supported by " consideration " before it will be enforced : but equity will not allow the promisor to go back on it if it would be " inequitable." In this conflict, the Judicature Acts say that the rules of equity are to prevail.

III. THE TEST OF WHAT IS " INEQUITABLE "

There still remains the question, when is it " inequitable " to allow a person to go back on his promise? The test of what is " inequitable " may be different when there is a promise from that when there is some other conduct which leads the other to believe that the strict rights will not be enforced. A promise has always been considered to be different in nature and quality from conduct of negligence or omission. A man should keep his word. All the more so when the promise is not a bare promise, but is made with the intention that the other party should act upon it. Just as contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.

The difference may lie in the necessity of showing " detriment." Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of the promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it. That is sufficient in the case of promises given on the formation of a contract. It should also be sufficient in the case of a promise given on the modification or discharge of a contract.

But where the party has made no promise, express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced or kept in suspense, then the position is different because there is no question of good faith—no question of a man keeping his word. In those circumstances it may be necessary for the other party to show not only that he acted, but also that he acted to his detriment, in the belief that the strict rights would not be enforced. That is what is necessary in the case of an estoppel and there is no good reason why it should not be necessary here.

It must be acknowledged that the foregoing distinction has not yet been drawn in the cases, but it is interesting to notice that the actual decisions are all consistent with it.

IV. The Cases on Promises

When a party acts on the faith of a promise, the act done is often to his detriment. In those cases the point—whether detriment is necessary or not—does not arise. Such a case was *Fenner* v. *Blake* [1900] 1 Q.B. 426, where a tenant promised to give up premises at midsummer, and on the faith of the promise the landlord sold the premises with a right to vacant possession at midsummer. That was clear action to his detriment, and the tenant was held bound by his promise. So also in *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227 the War Office gave a written assurance to an officer that his injury was accepted as attributable to war service. On the faith of the assurance the officer forbore to get a medical opinion in support of his claim. That was clear action to his detriment and the Crown was held bound by the assurance.

There are some cases, however, where a party acts on the faith of a promise but does not act to his detriment. In those cases the point—whether detriment is necessary—does arise. The cases seem to show that the promisor has been held bound by his promise, even though he has suffered no detriment, so long as he has acted on the faith of the promise. That was so in the case of *Central London Property* v. *High Trees House* [1947] K.B. 130 where, owing to war conditions, a landlord promised to accept less rent for the premises than the sum provided in the lease. On the faith of the promise the tenant remained in the premises paying the less sum. It is difficult to see that this was any detriment to him. It was indeed a benefit to him. But does that mean that the landlord should be allowed, years afterwards, to go back on his promise and to claim the full rent for the back periods? It would be most inequitable that he should be allowed to do so. The case falls directly within the principle laid down by Lord Cairns in *Hughes* v. *Metropolitan Ry.* (1877) 2 App.Cas., at p. 448.

The observations in the *High Trees Case* have been said to be *obiter*, but the same cannot be said of the decision of the Court of Appeal in *Foster* v. *Robinson* [1951] 1 K.B. 149. In that case a farmer let to one of his men a cottage at £3 5s. payable every half-year. After many years of service the man retired and a conversation took place which the farmer described in these words—it was the only evidence on the point—"I told him the existing tenancy would cease and I would charge him no more rent and he could live there the rest of his life rent free. He said 'Thank you very much' and said he was very pleased to accept the condition." On the faith of the farmer's promise the man stayed in the house

paying no rent until, four years later, he died. Thereupon his daughter, who had lived with him for nine years, claimed that she was entitled to the house as his administratrix and successor to his tenancy. It was held by the Court of Appeal that the man was not a tenant at the time of his death but only a licensee for life and that he had no tenancy capable of transmission to the daughter. The question turned on whether the man had surrendered his tenancy, and that depended on the conversation between the farmer and the tenant four years before. It clearly did not operate as a surrender by the act of the party, because it was not by deed or in writing. It was a surrender by operation of law because—and this is the point—the landlord's promise was binding on him. The landlord had made a deliberate promise that the man could stay in the house rent free for the rest of his days. The man acted on the promise by staying in the house and paying no rent. That was no detriment to the man. It was to his benefit. But nevertheless the Court of Appeal held the promise binding on the landlord. Being binding on him, it created a licence which was inconsistent with the continuance of the tenancy and thus effected a surrender by operation of law. The Master of the Rolls, Sir Raymond Evershed, expressly said that the promise was binding on the landlord: "If the landlord having made the arrangement sought to revoke it, he would be restrained by the court from doing so. Thus the result is arrived at that the tenant was entitled as licensee to occupy the premises without charge for the rest of his days and did so." Now it cannot be said that the surrender was itself a consideration sufficient to make the promise binding. That would indeed beg the question: because there would be no surrender unless the promise was binding. The promise must first be held binding before you can say there was any surrender. And why was [redacted]se held binding? Not because the man gave any considera[redacted]it, for he had given none except his past services, and a past consideration is no consideration in law. It was binding on the landlord simply because the man had acted on it. The Master of the Rolls made that clear when he went on to say "It is not a question of mere agreement here; there was here an agreement and *super-added acts in pursuance of the agreement* sufficient to show that effect in the fullest sense was given to the agreement, the new agreement being inconsistent with the continuance of the old tenancy." It is submitted that the case of *Foster* v. *Robinson*, although not expressly founded on the *High Trees Case*, is based on the self-same principle.

The decision in *Foster* v. *Robinson* is undoubtedly complicated by the question of surrender: but the complication did not arise in the more recent case of *Wallis* v. *Seamark* [1951] 2 T.L.R. 222. There a house was let fourteen years ago at 16s. a week and the rent book stated "one month's notice each party." Four years

later the words " each party " were scratched out and the alteration was made " one month's notice from tenant; two years' notice from landlord " and initialled by the landlord's agent. There was no other evidence of the agreement, but the alteration clearly evinced a promise from the landlord that he would not turn the tenant out except on two years' notice. The tenant acted on that promise by remaining on and paying the rent. There was no evidence that the tenant's act in remaining was any detriment to the tenant, but nevertheless the promise was held to be binding on the landlord, and the reason was because the tenant had acted on it. Somervell L.J. said " The consideration is the tenant's remaining on and paying the rent." This use of the word " consideration " is interesting. It accords with the modern view that an act done is consideration, even though it is no benefit to the promisor and no detriment to the promisee.

These cases seem to warrant the conclusion that in cases of deliberate promises which are intended to create legal relations it is sufficient if they are acted upon, even though there is no detriment in so acting.

V. Cases on Conduct

When there is no promise, but only some lesser conduct—which leads the other party to believe that the strict rights arising under the contract will not be enforced or kept in abeyance,—the cases show that detriment is necessary. The original party is not to be debarred from enforcing his rights unless the other has acted to his detriment on the belief, and then only to the extent that his position has been prejudiced by it. If the original party can, by notice or otherwise, remove the prejudice, then the strict rights revive.[2]

That was the position in the two original cases *Hughes v. Metropolitan Ry.* (1877) 2 App.Cas. 435 and *Birmingham & District Land Co.* v. *L. & N.W. Ry.* (1888) 40 Ch.D. 268. In *Hughes* v. *Metropolitan Ry.* the landlord, during the currency of a six months' dilapidation notice, entered into negotiations with the tenant for the purchase of the lease. Later the negotiations broke down. The House of Lords held that the six months' dilapidation notice did not begin to run until the negotiations broke down. The tenant was therefore protected only to the extent that his position was prejudiced by the negotiations. In the *Birmingham Case* a tenant under a building lease was bound to build within a specified time. The landlord requested the tenant not to build until the result of certain negotiations was known. It was held that the landlord could not afterwards insist on the strict contractual time until notice was given to the tenant giving him a reasonable time to complete the building. The tenant again was only

[2] This matter is well discussed by Mr. J. F. Wilson in 67 L.Q.R. 330.

protected to the extent that his position had been prejudiced by the landlord's request. So also in *Panoutsos* v. *Raymond Hedley* [1917] 2 K. B. 473, the sellers, who had by their conduct waived the necessity of payment by confirmed banker's credit, were not allowed afterwards to demand a confirmed credit without giving reasonable notice beforehand. In all these cases the party who had, by his conduct, led the other to believe that the strict legal rights would not be enforced, was not debarred altogether from enforcing them. He was allowed to enforce them on giving reasonable notice. That meant that he was only debarred from enforcing his legal rights to the extent that the other party was prejudiced.

There have, moreover, been recent cases in the Court of Appeal which proceed on the same principle. In *Charles Rickards* v. *Lothian* [1950] 1 K.B. 616, a motor car dealer, who had agreed to do work on a car by a certain time, was late in delivery. Notwithstanding the delay his customer repeatedly requested delivery, and on the faith of the request the dealer did much work in an attempt to comply with it. It was held that the customer by his conduct had waived his strict rights as to time and could not insist on them except on giving reasonable notice.

VI. Conclusion

The result would appear to be that the wide equitable principle stated by Lord Cairns in *Hughes* v. *Metropolitan Ry.* can be divided into two distinct branches:

1. Cases where there is a promise by one party to waive, modify or discharge his strict legal rights, such promise being intended to affect their legal relations and to be acted on by the other party. In those cases the promise is binding as soon as the other party has acted on it, and the only question then that can arise is as to the true interpretation of the promise. These cases seem to fall more naturally under the law of contract, rather than the law of estoppel.

2. Cases where there is no promise but only conduct by one party which leads the other party reasonably to believe that the strict legal rights will be waived, modified or discharged. In those cases the first party will not be allowed to insist upon his strict legal rights after the other party has acted to his prejudice unless he first takes steps to remove the prejudice. These cases can be brought into the first branch by means of an implied promise, but it seems better to regard them as a kind of estoppel.

If one compares the cases concerning promises on the formation of a contract, with those concerning cases on its modification and discharge, it would seem that, since the fusion of law and equity, we are approaching a state of affairs which Ames regarded as desirable, namely, that any act done on the faith of a promise

should be regarded as sufficient consideration to make it binding. If the law should develop in this way, nearly all the recommendations of the Law Revision Committee will be achieved without recourse to legislation at all.

A. T. Denning.[3]

[3] The Rt. Hon. Sir Alfred Denning was appointed a judge of the High Court of Justice in 1944 and a Lord Justice of Appeal in 1948. He is the author of *Freedom under the Law* (Hamlyn Lectures, 1949).

WHEN IS A DOCUMENT FALSE IN THE LAW OF FORGERY?

THERE have recently been two important articles on the definition of " document " in the law of forgery,[1] but little seems to have been written on the problem of when a document is false. Even the larger textbooks do little more than give a string of cases without making a serious attempt to correlate and elucidate them. Yet the cases on the topic are not easy: in most of them detailed reasons for the decisions are not found in the reports, and in some there is a failure to cite relevant authorities. In these circumstances it is not surprising that there is at times conflict between different precedents, and that the law has developed in a haphazard manner.

It is here proposed to consider four of the aspects of making a false document which seem to demand special treatment:—

Making a false document by

(1) Signing a fictitious name;
(2) Passing off an otherwise true document by false representations dehors the instrument;
(3) Signing one's own name;
(4) Writing a false address or description to a true signature.

It is hoped to show that in the last three cases the law of forgery has departed from its early principles in the matter, in each case so as to enlarge the scope of the offence.

(1) *Signing a fictitious name.*

It was doubted until 1754 whether a document executed in a fictitious name could ever constitute a forgery, but in that year eleven of the judges met to consider the case of *Anne Lewis*,[2] and approved the conviction of the prisoner. She had been indicted for uttering a forged power of attorney, purporting to be executed by a fictitious Elizabeth Tingle, alleged to be the daughter of a deceased seaman, who had in fact died childless. The object of the prisoner was to obtain prize-money which was due to the deceased, and would have been recoverable by his next-of-kin had he left any.

The next important case, eleven years later, *R.* v. *Dunn*,[3] is similar in that the alleged falsity consisted in the signature of an apparently non-existent person, the widow of a deceased seaman, Wallace, who, so far as the evidence showed, left no widow. The prisoner personated the " widow " of the seaman to whom wages

[1] Mr. J. W. C. Turner, 32 Va.L.R. 939; Professor Glanville Williams, 11 M.L.R. 150.
[2] Fost. 116; 168 E.R. 57 (C.C.R.).
[3] 1 Leach 57; 2 East P.C. 976; 168 E.R. 131 (C.C.R.).

were due, and induced the prosecutor to advance her money on her own promissory note, which she executed in his presence in the name of Mary Wallace. The charge was of forging and uttering this promissory note. The case was reserved for the consideration of all the judges, of whom nine were for conviction, Aston J. dissenting. The basis of the decision is that Dunn obtained superior credit by the use of the fictitious name: the prosecutor would not have lent money to her, had he not believed her to be entitled to the wages which he knew were due to Wallace. The judges agreed that " in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person." [4] Pausing there, it appears that the judges would consider such a case as they pose not to be forgery, because the instrument would not be a false one. Then they argue that if a superior credit is obtained by the fictitious name the document is false, because the prosecutor is materially deceived thereby. It is submitted that this reasoning is fallacious, and that forgery, as distinct from the statutory felony of obtaining property on forged instruments enacted in section 7 of the Forgery Act, 1913,[5] is a crime whch is independent of the state of mind of the prosecutor. It is suggested that the only reason there may be no forgery in such a case is that no intent to defraud can be proved, and, however false the instrument, there is of course no forgery of a private document without such an intent. This is perhaps recognised implicitly in a subsequent passage in *R.* v. *Dunn*, where the court is reported as saying: " If an instrument be false in itself, and by its purporting to be the act of another, a credit is obtained, which would not otherwise have been given, it is a forgery." There seems, therefore, to be some ambiguity in the dicta in *Dunn's Case*. The rule of law is clearly laid down that, if a person gives a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, but it is not so clear whether this is because the instrument is not false, or because there is no intent to defraud thereby.

The dicta in *Dunn's Case* are of importance, because they form the *ratio decidendi* of the decision of five judges of the Court for Crown Cases Reserved in *R.* v. *Martin* (1879).[6] There the prisoner bought a pony and chaise from one Lee, who had long known him, and in payment gave a cheque on a bank where his account had been closed some months previously, drawing it in the presence of Lee in the name of William Martin, whereas his real name was Robert Martin. Lee pocketed the cheque unread. Martin was clearly guilty

[4] This quotation and the hypothetical case considered are of great importance, as they are the foundation of the difficult case of *R.* v. *Martin* (1879), shortly to be discussed.

[5] Re-enacting ss. 38, 39, Forgery Act, 1861.

[6] 5 Q.B.D. 34; 49 L.J.M.C. 11; 41 L.T. 531; 14 Cox 375 (C.C.R.)

of obtaining by false pretences, as he knew the cheque would not be met: *R.* v. *Hazelton* (1874),[7] but he was indicted for forgery and convicted. Cockburn C.J., the trial judge, in reserving the case, explains that his doubts arose because Martin drew and uttered the cheque as his own, and did not obtain credit from Lee by the use of the false Christian name. The substitution appears to the judge to be without motive, though it occurs to him that Martin may have believed, wrongly of course, that he would escape liability to be sued on the cheque by using a false name. No counsel appeared on either side, and the five judges quashed the conviction in a nine-line judgment, most of which was taken up with the first quotation given above from *Dunn's Case*.

It is submitted that it is better to regard *Martin's Case* as a decision not that there was no false instrument, and therefore no forgery, but that there was no intent to defraud by means of the false signature and therefore no forgery. The former view is to be rejected, in the first place as not in accord with the previous decisions of the Court for Crown Cases Reserved in *R.* v. *Sheppard* and *R.* v. *Whiley*, which were not cited, secondly as not the real influence that led to the judicial " hunch " in favour of Martin, and thirdly as not based on a true conception of the essence of forgery.

First to consider the conflicting authorities. In *R.* v. *Sheppard* (1782)[8] the prisoner was indicted for uttering (East says " for forging ") a banker's draft knowing it to be forged. The falsity of the instrument was alleged to consist in the signature of the drawer " H. Turner." This was a fictitious name. The prisoner offered this draft to Elliott, a silversmith, in payment for some goods. Elliott, imagining it to be the prisoner's own draft, wrote the name " Turner " in his order book, and the prisoner supplied him with a fictitious address. Elliott testified that he gave credit to the prisoner, as his appearance was genteel, and not to the draft. Nevertheless the prisoner's conviction was upheld by twelve judges, as the fictitious name was used only for the purpose of deceiving. The full reasons are not given in the report, but *Dunn's Case* among others was relied on. In the subsequent case of *R.* v. *Aickles* (1787),[9] there was a difference of opinion among the judges, some holding that there is no forgery where the document is made by the prisoner as his own, and credit is given by the prosecutor to the person and not to the name, but these doubts were set at rest by two cases of 1804 and 1805, when the same point was reserved in view of the difficulty of reconciling the cases, and all the judges held that the conviction was right, there being no doubt as to the intent to defraud: *R.* v. *Marshall*,[10] *R.* v. *Whiley*.[11] *Whiley's Case* is a particularly clear one.

[7] L.R. 2 C.C.R. 134.
[8] 1 Leach 226; 2 East P.C. 967; 168 E.R. 215 (C.C.R.).
[9] 2 East 968; 1 Leach 438; 168 E.R. 321 (C.C.R.).
[10] R. & R. 75; 168 E.R. 691 (C.C.R.).
[11] R. & R. 90; 168 E.R. 699 (C.C.R.).

He was indicted for forging and uttering a bill of exchange for sixty pounds, drawn in the name of Samuel Milward (a fictitious name), payable to his own order. The prisoner ordered goods from Thurston, value forty-nine pounds ten shillings, gave him the bill in question, and obtained from him ten guineas in cash. The bill was dishonoured. Thurston testified that he did not know the prisoner, and would have given him equal credit had he signed his real name of Samuel Whiley. All the judges upheld the conviction.

The only difference between the facts in *R.* v. *Martin* and those in *R.* v. *Sheppard* and *R.* v. *Whiley* is that Martin was previously known to his dupe, whereas Sheppard and Whiley were not. The decisions in *Sheppard* and *Whiley* show that in the crime of forgery the state of mind of the prosecutor is not material: whether he gives credit to the document or not, the prisoner may still be guilty of forgery. The difference in *Martin's Case* is that the prisoner and prosecutor are well known to each other. The prisoner is, therefore, aware that if credit is given to him it will be to him as a person, and not on the faith of the particular name by which he signs the document. To append a false signature in such a case appears to be without motive. Generally a man is presumed to intend the natural consequences of his acts, and if he uses a false name the intent to defraud thereby will readily be presumed. But if the act of the prisoner appears to be without motive, the court will hesitate to apply the presumption, and a conviction may well be quashed. It is suggested that this is the underlying reason why the conviction of *Martin* was quashed: the court refused to find an intention to defraud as the act appeared to be without motive. Kenny treats the case as a decision that the instrument was not a false one.[12] It may be admitted that superficially this is a correct interpretation of the *ratio decidendi*. The judgment is very brief, and consists mainly of the quotation from *Dunn's Case*, which strongly supports the view that the decision in *Martin* is based on the fact that the instrument was not false. It is, however, submitted that what seems to have been worrying Cockburn C.J., when he reserved the case, was the absence of motive. He does not appear to have *Dunn's Case* in mind. The case comes before five judges, and it is Hawkins J. who refers to *Dunn's Case*. The chief justice is now content. He had no desire to convict, and now that authority has been provided to support his view, the conviction is quashed. Cross and Jones use the case as a good illustration of the necessity of proving an intent to defraud.[13] It is suggested that this is the true and underlying basis for the decision, though it cannot be extracted from the brief judgment, and the learned authors might well explain that they are

[12] *Outlines of Criminal Law*, 15th ed., 300. Also *Russell on Crime*, 1458 (10th ed., 1950).
[13] *Introduction to Criminal Law*, 2nd ed., 208.

regarding *Martin's Case* as a right decision for the wrong reasons, or at least a case where actions speak louder than words.

There are two cases dealing with another branch of the law of forgery which strengthen the two conclusions here drawn, firstly that the reasoning in *Dunn's Case* is fallacious in regarding the fact that the prosecutor was materially deceived as relevant in deciding whether the document is false, and secondly that *Martin's Case* is explicable as a decision on the absence of intent to defraud, the motive not being apparent. These authorities deal with the question whether there can be forgery, although in fact no person could have been defrauded by the false instrument. In *R.* v. *Marcus* (1846) [14] the prisoner, a stockbroker, was indicted for forging and uttering a deed of transfer of ten shares. He bought one hundred shares from R in L's name without any authority from L, counterfeiting L's signature. He then transferred ten of these shares to B, again counterfeiting L's signature. Cresswell J. directed an acquittal, as he could not discover that anyone could conceivably be defrauded, not R because Marcus paid him for the shares, not L because under no circumstances could he be required to pay any money, not B because he received the shares he paid for, nor the company because, the shares being fully paid, the substitution of the credit of another person could not harm the company. Cresswell J. observed at p. 361: "There must at all events be a possibility of some person being defrauded by the forgery." In Archbold [15] this statement is contrasted with that of Maule J. in *R.* v. *Nash* (1852) [16]: "The Recorder seems to have thought there must have been someone capable of being defrauded by the forgery. That is not necessary." The indictment in *Nash's Case* was for forging transfers from H to the prisoner of partly paid shares in a railway company. The company was in a precarious position, paying no dividend, and the question of winding up had been considered. The shares had no market value. The Recorder left the question of intent to defaud to the jury. He pointed out that H might be defrauded if the position of the company improved, or the company if it made a call, or anyone who bought from the prisoner. The conviction was upheld by the Court for Crown Cases Reserved. The conflict between the views of Maule J. and Cresswell J., at which Archbold seems to hint, is not a real one. Cresswell J. was also a member of the court in *Nash's Case*, and explains his part in the earlier case of *Marcus* at p. 150: "It seems that I thought there was no proof of an actual intention to defraud anyone. The observation that there must be someone to be defrauded was made with reference to the legal principle that you must impute to a man the intention of producing the necessary consequences of his act, and to the fact that no other ground was

[14] 2 C. & K. 356; 175 E.R. 147.
[15] 32nd ed., 791.
[16] 21 L.J.M.C. 147, 149 (C.C.R.).

shown for imputing an intention to defraud in that case, but the possibility that the individuals named might have been defrauded." In other words, the presumption that a man intends the natural consequences of his acts will not be applied where the act appears to be without motive, and on this basis Marcus and Martin are acquitted of forgery. One can imagine that had it fallen to Cockburn C.J., to consider his remarks in *R.* v. *Martin* in a subsequent case, he might well have adopted the same explanation as did Cresswell J.

The decision in *R.* v. *Martin* has been applauded in an 1890 article by Mr. T. W. Brown,[17] as applying the dictates of justice and common sense, and as breaking with the old rule in cases like *R.* v. *Sheppard* (*ante*). It is submitted that the actual decision in *Martin* is sustainable on other grounds, *viz*: that there was no intent to defraud by the falsity of the instrument, and, as for cases like *Sheppard*, the prisoner still has the benefit of the answer of the jury to the question whether there was any intent to defraud, and normally, in such cases, it may be assumed that a properly directed jury is unlikely to find the prisoner guilty of forgery. It is submitted that it is better to leave the accused who has signed in a fancy name to the mercy of the jury than to withdraw the case from the jury on the ground that the instrument is not a false one. As for *Martin's Case* itself, Cockburn C.J. surmised that Martin hoped to avoid liability on the cheque by using a false Christian name. This possibility should have been left to the jury, as, if this was proved to be the prisoner's intent, it would amount to an intent to defraud, an intent by the falsity of the instrument to deprive the prosecutor of his action on the cheque, though in law the false name would make no difference to Martin's civil liability.

There is one set of circumstances where signing in an assumed name is not forgery, and that is where the prisoner can prove that he was already known by this assumed name before making the document in question: *R.* v. *Bontien* (1813),[18] *R.* v. *Peacock* (1814),[19] though in a Texas case it has been held that the name must have had currency in commercial and not merely in family circles: *Ware* v. *The State* (1933).[20] This is still a good defence even though the name was originally assumed for fraudulent purposes, provided those purposes did not include the drawing of documents: *Peacock* (*ante*), *R.* v. *Whyte* (1851).[21] These cases are clear authority that no forgery is committed in such circumstances, but they do not explain whether this is because the instrument is not false, or because there is no intent to defraud.

To sum up, it appears that the following is the rule of law which

[17] 30 Am.L.R. 500, 510.
[18] R. & R. 260; 168 E.R. 791 (C.C.R.).
[19] R. & R. 278; 168 E.R. 801 (C.C.R.).
[20] 65 S.W. 310.
[21] 5 Cox 290; 15 J.P. 405.

can be deduced from the cases and is at the same time the most reasonable working rule:

To adopt an alias and to sign a document in that name is to make a false instrument. The intent to defraud thereby will be presumed, as a man is presumed to intend the natural consequences of his act, unless the prisoner can prove that the alias has been long adopted for business purposes, or the adoption appears to be without motive

(2) *Passing off an otherwise true document by false representations dehors the instrument.*

Kenny remarks that to be false a document must tell a lie about itself.[22] At one time the law seems to have been that telling lies about a document was not forgery, as the document did not thereby become a false one. This is still good law, where the document does not, on its face, purport to be what the prisoner orally represented it to be: *R.* v. *Jones* (1779),[23] where Jones was acquitted on an indictment for uttering a forged note of the Bank of England. The prisoner represented the document to be a Bank of England note, but *ex facie* it was but an incomplete promissory note.

An early authority where the document does not belie the false representation is *R.* v. *Hevey* (1782).[24] Hevey was indicted for forging an indorsement to a bill of exchange for thirty pounds, and uttering it knowing it to be forged. The bill was in fact indorsed by one B. McCarty. Hevey represented to a pawnbroker that this was his own signature, and obtained from him a gold watch, value eighteen guineas, and eleven pounds two shillings in cash, in return for the bill. The question whether if a man produce the real signature of an existing person, and falsely declare that he is the identical person whose signature it purports to be, he is guilty of forgery was reserved for the consideration of eleven judges, who held for the prisoner, as the instrument was not a false one. Of course, had Hevey merely picked up this bill in the street already signed by McCarty, the latter being a respectable person, Hevey could not be guilty of forgery or of uttering a forged document because the document would not be a false one. But the case before the court was a strong one as Hevey, McCarty and Beatty, the acceptor, were forthwith indicted and convicted of conspiracy to defraud in issuing this bill. None of them was in fact good for thirty pounds, or, for that matter, thirty pence. The report does not explain how the fact that Hevey passed himself off as McCarty assisted in the fraud, or that this was part of the original scheme. The explanation no doubt lies in the fact that Hevey was an insolvent debtor unlawfully released from prison by the Gordon rioters, and probably anxious to preserve his incognito.

[22] 15th ed., 298.
[23] 1 Leach 204; 1 Doug. 204; 2 East P.C. 864; 168 E.R. 204.
[24] 1 Leach 229; 2 East P.C. 856; 168 E.R. 217 (C.C.R.).

A similar case to that of *Hevey* is *R.* v. *King* (1832).[25] King was indicted for forging the indorsement and acceptance to a bill of exchange, drawn and indorsed by Thomas Webb, and accepted by Samuel Knight, and also for uttering the bill. There was no clear evidence whether Webb and Knight actually existed, or who had signed the indorsement and acceptance, but Parke J., as Lord Wensleydale then was, directed the jury: "It may be a fraudulent transaction altogether; yet, if the signatures are those of persons actually in existence, though the bill may be false and fraudulent, still it cannot be said to be forged." The jury found King not guilty.

The proposition that misusing a document, which does not purport to be what it is not, does not constitute the crime of forging or uttering a false document also seems to be borne out by the case of *R.* v. *Smith* (1858).[26] Smith, finding it difficult to sell any other baking powder but Borwick's, had wrappers printed which were similar to those used to enclose Borwick's baking powder, except that the printed reproduction of Borwick's manuscript signature was omitted. Smith used these wrappers to wrap up his own baking powder, and fraudulently sold this as Borwick's. Smith was indicted for forging and uttering the wrappers, but his conviction was quashed by five judges. The court was doubtful whether such a wrapper was a document at all, but Mr. Turner gives his opinion,[27] which, with respect, seems to be the correct view, that the case was really decided on the point that the wrappers were not false. Bramwell B. remarked[28]: "One of these wrappers is as good as the other. The forged one does not assert anything which the other does not assert. The one is as true as the other, but one gets improperly used." This reasoning has been criticised by Professor Glanville Williams.[29] But the court does seem to acknowledge the principle that a document to be false must tell a lie about itself, and that false representations, oral or by conduct, cannot convert a true document into a false one. Whether the principle was mistakenly applied to the facts of the case is another matter.

The earliest and clearest case which involves a departure from the original rule that telling lies about a true document cannot render it false is that of *R.* v. *Mitchell* (1847).[30] Mitchell was indicted for uttering a forged acceptance to a bill of exchange. The acceptance purported to be that of J. Cooper, of Leeds. The bill had indeed been accepted by such a person, a stable hand, but Mitchell passed it off as the acceptance of a respectable Leeds merchant of the same name. Cresswell J. directed the jury that if Mitchell obtained the signature of Cooper, stable hand, intending to pass it

[25] 5 C. & P. 123; 172 E.R. 905.
[26] D. & B. 566; 27 L.J.M.C. 225; 169 E.R. 1122 (C.C.R.).
[27] 32 Va.L.R. 939, 952. Also in his 1950 edition of *Russell on Crime*, 1457.
[28] 27 L.J.M.C. 226.
[29] 11 M.L.R. 150, 158.
[30] 1 Den. 282; 169 E.R. 246.

off as that of Cooper, merchant, he was guilty of the offence charged, and the jury so found. Counsel for the Crown had argued that it was immaterial whether the stable hand was innocent or an accomplice,[31] but the court seems to have been satisfied that he was innocent, and the judgment seems to have proceeded on the footing that Mitchell was guilty of forgery by an innocent agent. Normally if a person does not make some part of the false document, he cannot be guilty of forging it, except as an accessory, but there is authority that forgery may be committed by the hand of an innocent agent.[32] In considering, however, whether a person is guilty of forgery through an innocent agent, the test is to regard the act of the agent as that of the prisoner himself. Putting the facts in *Mitchell's Case* as if the prisoner had signed " J. Cooper, Leeds " with his own hand, the signature would be genuine, as he had the authority of J. Cooper so to sign. The instrument is *ex facie* true. The only falsity is the intent at the time of making to pass off the signature as that of another person at a later date. If ultimately the prisoner does utter the instrument with such a false representation he will, at least in a case like *Mitchell's*, be guilty of obtaining by false pretences, and the overlap with forgery seems unnecessary. With the law as laid down in *Mitchell's Case*, he will be guilty of forgery even though he repents of his intention before uttering the document, and never in fact misuses it: *R.* v. *Elliott* (1777).[33] The case is an unsatisfactory one. No counsel appeared for the prisoner and new ground was broken, probably unconsciously.

Mitchell's Case was followed by the Irish Court for Crown Cases Reserved in *R.* v. *Mahony* (1854).[34] There Moore, the prosecutor, offered to give Mahony, his debtor, time to pay if he got his mother-in-law, Mrs. Watters, to join him in promissory notes for the amount due. Mahony got the notes executed by his wife, who signed in her

[31] If Cooper was an accomplice, it is by no means clear that in 1847 he was guilty of forgery. He merely signed his own name and address. It is submitted (*post*) that this was not making a false document until s. 1 (2) (*c*) of the Forgery Act, 1913, except in the case of the finder of lost documents who affixed his own signature. He, and Mitchell with him, should be acquitted of forgery, until 1913, if they are both in the plot to defraud.

[32] Kenny (15th ed., 300) illustrates the point from *R.* v. *Riley* [1896] 1 Q.B. 309, the case of the telegraph clerk who sent a telegram naming the winner of the 2.45 after the race had been run, and, by writing the time of dispatch as 2.40, induced the bookmaker to pay out. He was convicted of obtaining the money by a forged instrument. The transcript of the message, says Kenny, is made out by the hand of a purely innocent agent at the arrival office. But, with respect, this is a mere copy, and only secondary evidence of the original: *R.* v. *Regan*, 16 Cox 203. (See also s. 88, Indian Evidence Act, reversing this rule so far as India is concerned.) The original is in the prisoner's own hand and the question of forgery through an innocent agent does not arise. A better illustration is *R.* v. *Clifford* (1845) 2 C. & K. 202, where C was indicted for forging a receipt on a post office order payable to W.S. C wrote to B telling him to sign the receipt in the name of W.S., as the latter had given him (C) authority to do so. B, an innocent party, did so, obtained the money and sent it to C, who was held guilty of forgery by an innocent agent, as he had no authority from W.S.

[33] 1 Leach 175.

[34] 6 Cox 487.

maiden name " A. Watters." He then handed the notes to Moore, who believed them to be executed by the mother-in-law. At maturity the latter of course denied all knowledge of the notes. Her Christian name was in fact Catherine. Five judges confirmed the conviction of Mahony for forging and uttering the notes. It is submitted that the decision is an unfortunate one. Jackson J. remarks, at p. 493, that it is very common with humbler classes in the south of Ireland (where the notes were executed) to call a married woman by her maiden name. The note bore the actual signature of A. Watters and was not a false instrument. Yet the only point that really worried Monahan C.J., the trial judge, who reserved the case, was the difference in initials of the wife and mother-in-law. At p. 494 he seems to indicate that the offence may be forgery by an innocent agent. This would probably be so if it was a case of *non est factum*.[35] Otherwise the signature of the wife, if she had no intention to defraud, would be regarded as if it had been signed by the husband, and as he had her authority, there is the same doubt, as in *Mitchell's Case*, whether this was forgery in 1854. The position of the prisoner is, however, a little weaker than in *Mitchell's Case*. In *Mitchell* there was a real acceptor, an honest stable hand. In *Mahony* there is no co-drawer who will be liable on the bill, as a married woman could not be liable on a promissory note in 1854. In *Mitchell* the signature of a real person is passed off as that of another real person. The only disadvantage to the prosecutor is that the credit of the stable hand is inferior to that of the merchant. In *Mahony* the signature of a real person under legal disability is passed off as that of another real person under no such disability. Not merely has the actual signatory insufficient property to satisfy the claim of the prosecutor, but any property she may have is not legally bound.

Mitchell and *Mahony* were cases where it was held that it is forgery to pass off the signatures of real persons as those of other real persons. In *R.* v. *Nisbett* (1853),[36] Williams J. held that it was forgery to pass off the true signature of A as that of a fictitious person B. Nisbett was indicted for forging and uttering a bill of exchange. One count charged him with forging the name of the drawer. The signature of the drawer purported to be that of Robert Mitchell. Nisbett's defence was that his brother-in-law, Robert (or Richard) Mitchell, had given him authority to draw bills in his name. At the time of uttering, Nisbett passed off this signature as that of a clerk of that name holding a responsible and lucrative position at Nine Elms Station. Years before, Nisbett's brother-in-law had been employed there, but was a poor man. Williams J. directed the jury that if the prisoner represented the signatory as

[35] See Kenny, 15th ed., 301, but see *Collins* (1843) 2 M. & Rob. 461; 174 E.R. 349, where C. induced an illiterate person to execute a deed of gift in his favour by misrepresenting it as a requisition to bring forward a Whig candidate, and Rolfe B. directed the jury that this was not forgery.

[36] 6 Cox 320.

worth a thousand pounds, when in fact he was worth only ten shillings, this would not be passing off a bill as that of a fictitious person, and it was for the jury to decide whether Nisbett tendered the bill as that of a person who did not in fact exist, in which case it would be forgery. The jury found Nisbett guilty. According to this direction, therefore, a real person does not become fictitious merely because the prisoner gives him false attributes, and it is for the jury to say whether so false a character has been given to a real person that he has become fictitious. Presumably if I falsely tell the prosecutor that the drawer of a bill is not an infant, I am not tendering the bill as that of a fictitious person, and in *Mahony's Case* if the prisoner had merely represented that the signature of his wife was that of a *feme sole*, and had not further represented that it was the signature of another real person, his mother-in-law, he would not have been guilty of forgery.

The cases of *Mitchell*, *Mahony* and *Nisbett* appear to carry the law of forgery a step beyond the previous decisions, and to represent an unwarrantable extension of the law, but, although two of them are merely *nisi prius* decisions and the third an Irish case, their authority seems to be confirmed by section 1 (2) of the Forgery Act, 1913. In this subsection the first statutory definition of a false document is attempted. Most of the definition deals with undoubted cases of falsity, where a document purports to be what it is not, but in section 1 (2) (*c*) are these words:—

> " In particular, a document is false:—
>
> (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it."

These words are apt to include several cases where a document does not tell a lie about itself, but is falsified only by an intent to pass it off, by means of oral representations, as something that it is not. The case of *Nisbett* appears to fall within the ambit of the section. According to the finding of the jury, the bill was drawn by the prisoner in the name of an existing person, his brother-in-law, by his authority, with the intention on the part of the prisoner that it should pass as having been made by a fictitious person. The cases of *Mitchell* and *Mahony* are covered by the section, as in each case a document was made by the prisoner (by the hand of an innocent agent) in the name of an existing person, by the authority of that person, with the intention that it should pass as having been made by some real person other than the person who authorised it. It could be argued that the three cases are not within the section, that the intention to pass off the document must be that of the " existing person " whose name is misused, that the section was merely an attempt to enact the effect of such cases as *Mead* v. *Young*

(*post*) and *R.* v. *Parkes and Brown* (*post*), and it is not sufficient that the actual writer, the person with authority, has a fraudulent intention. Such an argument would require the words " of such existing person " to be read into the section after the word " intention," and even if this contention were to prevail, the prosecution could still fall back on section 35 of the Criminal Justice Act, 1925, which enacts that a document may be false, notwithstanding that it is not false in any such manner as is described in section 1 (2) of the Act of 1913. These three decisions seem, therefore, to be rooted in the law.

(3) *Signing one's own name.*

The question whether one who signs his own name to a document ever makes a false document seems first to have arisen, in the type of case where a document has, by chance (usually by loss or misdirection in the post), come into the hands of a person, who bears the same name as one of the contemplated parties to the document, and the receiver, though he realises the mistake, signs his name.

The point was first raised in a civil case decided by the Court of King's Bench in 1790: *Mead* v. *Young*.[37] This was an action by the indorsee of a bill of exchange against the acceptor. The bill was payable to Henry Davis or order. The bill fell into the hands of another Henry Davis, who indorsed it to the plaintiff, who discounted it. The court held by a majority of three judges to one that if Henry Davis made the indorsement with the knowledge that he was not the person to whom the bill had been made payable he was guilty of forgery, and therefore the plaintiff could not recover as he derived title under a forgery. Fifteen years later there was a criminal case before all the judges, but *Mead* v. *Young* was not cited, nor did Grose J., who was one of the court in both cases, recall it. This was *R.* v. *Story*.[38] Story asked at the post office if there were any letters *poste restante* for Story. The clerk by mistake gave him a letter addressed to Storer. This contained a money order, and to obtain payment Story signed his own name on the back. The court held that Story was not guilty of forgery.

In the recent case of *R.* v. *Hudson* (1943),[39] neither *Mead* v. *Young* nor *Story's Case* seems to have been cited. There the Ministry of Food wished to make payment to L. Hutson for pigs he had sold to them. They sent him by post a cheque in favour of Mr. Hudson. The letter was delivered to the prisoner, J. Hudson. He, realising the mistake, returned it to the Ministry for the insertion of his initial. When he received it back, he opened a bank account with it, indorsing it " J. Hudson " over a twopenny stamp on the back of the cheque below a receipt in these terms: " Received

[37] 4 T.R. 28; 100 E.R. 876.
[38] R. & R. 81; 168 E.R. 695 (C.C.R.).
[39] 29 C.A.R. 65; [1943] 1 All E.R. 642 (C.C.A.).

from the Ministry of Food the sum shown on the face hereof in settlement of fat stock purchased." He was convicted of forgery of the indorsement, and his conviction was upheld by the Court of Criminal Appeal. The only point on which the prisoner appealed was that there was no evidence that the indorsement was in his handwriting.

It is submitted that *Story's Case* would not now be followed. There was the additional fact, not present in *Mead* v. *Young*, that the name signed was not the name of the payee. How much this weighed with the court is not clear. Mr. T. W. Brown regards it as based on a finely drawn distinction, and prefers the case of *Mahony*,[40] where, as has been mentioned, Monahan C.J., although worried about the difference in initials between the actual signatory and the person as whose signature it was passed off, supported the conviction. There is also *R.* v. *Parke* (1843),[41] where the counsel for the prisoner admits that to be false the signature need not be an actual facsimile of the true one, provided it in fact deceives. *Story's Case* has been given little prominence in writings on forgery, as the conviction was for obtaining by false pretences. In Russell the finding on forgery is mentioned only incidentally in the chapter on false pretences. In Archbold it is ignored.

Mead v. *Young* is, on the other hand, well known to criminal lawyers though merely a civil case. It was cited to the Court of Exchequer Chamber in *R.* v. *Watts* (1822),[42] and in *R.* v. *White* (1847) [43] was approved by Parke B., as Lord Wensleydale then was, Pollock C.B., and Patteson J. Through incorporation in *Kenny's Cases on Criminal Law*, it has become known to generations of criminal law students. Its accuracy is finally established by section 1 (2) (*c*) of the Forgery Act, 1913.

The cases considered so far under this head have been instances of a genuine document falling into the wrong hands, and being put to fraudulent uses by those hands. What is the position where a document is conceived and brought forth in fraud, but all that the rogue does is to put his own signature to the document, intending to pass it off as the signature of some other person, real or fictitious? It was held in *R.* v. *Woodward* (1796) [44] by Grose J. that this was not forgery. The prisoner, a soldier, signed his own name as drawer to a bill of exchange for five guineas, payable to bearer, and obtained money on it by saying that he came from the sergeant major of the regiment. It is submitted that this decision is in accord with the old principle that to be false a document must tell a lie about itself, but this principle is ignored by section 1 (2) (*c*) of the Forgery Act, 1913, which clearly overrules this case.

[40] 30 Am.L.R. 500, 502, note 3.
[41] 1 Cox 4.
[42] 6 Moo.C.P. 442; R. & R. 436; 129 E.R. 1258 (Ex.Ch.).
[43] 2 Cox 210, 213 (C.C.R.).
[44] Referred to in *R.* v. *Parkes and Brown*, 2 Leach 775, 782.

To return to the case of *Hevey* (*ante*), which was at one time regarded as an authority of the greatest significance,[45] it appears that there is today only one point on which the prisoner might escape conviction for forgery. If McCarty indorsed the bill intending that Hevey should pass off the signature as that of Hevey, he clearly falls within the ambit of section 1 (2) (*c*), and Hevey will be equally guilty as an accomplice. To escape, Hevey must therefore prove that it was no part of the original scheme that he should pass himself off as McCarty, and it was only at the time of uttering that he got cold feet, and, being afraid to indorse in his own name for fear of detection, determined to pretend he was McCarty.

Another case where under the old law it was no forgery to sign one's own name is illustrated by *R.* v. *White* (1847).[46] There the prisoner brought to the prosecutor a bill of exchange, drawn by M.C., payable to the drawer's own order, and indorsed by him, apparently in blank, saying falsely he came from one Tomlinson, whose servant he had in fact formerly been. The prosecutor remarked that Tomlinson had not indorsed the bill, and thereupon at the prisoner's direction wrote " *per* procuration T. Tomlinson " on the bill, and the prisoner signed his own name. The counsel for the prisoner admitted that the case must be considered as if the words " *per* procuration T. Tomlinson " had been written by the prisoner's own hand, but fifteen judges held that the offence was obtaining by false pretences and not forgery, there being no false making; the falsehood lay in the assertion of authority. This decision was soon overruled by section 24 of the Forgery Act, 1861.[47]

(4) *Writing a false address or description to a true signature.*

In two cases decided by the Court for Crown Cases Reserved, a distinction is drawn between adding the address or description of an existing person, and that of a fictitious person. If A signs his name, and B adds the address or description of another person of the same name, this is forgery if B knows of his existence, but otherwise not. In *R.* v. *Webb* (1819),[48] a bill of exchange purported to be signed by Thomas Bowden as acceptor, and Webb, who had drawn the bill, described him therein as a baize manufacturer of Romford. There was some evidence for Webb that one Thomas Bowden had indeed signed as acceptor, but he was not a baize manufacturer nor of Romford. The trial judge reserved the question whether, assuming these facts and an intent to defraud to be proved, Webb was guilty of forgery. Eleven judges decided that where there was no person answering the description there was no forgery. This distinction

[45] See for example the early editions of *Russell on Crime*, and note 53 (*post*).
[46] 2 Cox 210 (C.C.R.).
[47] Repealed, but now incorporated in s. 1 (2), F.A., 1913. In s. 24 it is provided that whosoever with intent to defraud shall draw, accept or indorse any bill of exchange by procuration or otherwise in the name of any other person without lawful authority or excuse shall be guilty of felony.
[48] R. & R. 405; 129 E.R. 1271 (C.C.R.).

was approved in *R.* v. *Blenkinsop* (1847).[49] Here B.'s servant, Wilkinson, who lived at Leeds, signed an acceptance on stamped paper that was blank except for some printed parts of a bill of exchange. B. completed the bill, addressing it to Wilkinson of Halifax. It was admitted that, at the time of making,[50] B. intended to pass off the bill as accepted by a Wilkinson of Halifax, who was known to him. Thirteen judges approved the distinction drawn in *Webb's Case* and upheld the conviction of B. for forgery.

In *R.* v. *Epps* (1864),[51] Willes J. refused to follow this distinction. Epps asked W whether he would discount a bill accepted by a Mr. Beard, seedsman, of Rottingdean, with whom he stated he had had dealings. After making inquiries, which must have been defective in some way as there was no such person, W agreed to do so. Epps got a servant of his called Beard, who lived at Maidstone, to write an acceptance on a blank bill stamp. Epps completed it, addressing it to George Beard, seedsman, Rottingdean. W then discounted it. The indictment was for forgery and uttering. Counsel for Epps naturally expected an acquittal, as there was no such person as Beard the seedsman. Willes J. robustly refused to admit that any such distinction had been drawn in the previous cases, and when pressed by counsel observed that it was impossible that it could have been so. This is a supreme example of judicial valour, a judge at *nisi prius* ignoring the opinion of twenty-four judges. It is submitted that the view of the puisne judge is the correct one. Section 1 (2) (*c*) of the Forgery Act, 1913, it is suggested, discards the distinction drawn in *Webb* and *Blenkinsop*, bearing in mind that there can be forgery by the hand of an innocent agent. The acceptance in *Webb's Case* was "made in the name of an existing person, . . . by his authority, with the intention that it should pass as having been made by some fictitious person, other than the person who . . . . authorised it." If Webb is regarded as having himself signed the name of Bowden with his authority, using him, that is, as an innocent agent [52] instead of getting him to sign, he makes a false document within section 1 (2) (*c*), if the construction of this subsection suggested above be adopted.

[49] 1 Den. 276; 17 L.J.M.C. 62; 2 C. & K. 531; 2 Cox 420.

[50] The intent to pass off the signature as that of another real person must exist at the time of making. If the intent is conceived subsequently, the offence is, if anything, obtaining by false pretences, and not uttering a forged document. *R.* v. *Watts* (1822) 6 Moo.C.P. 442 appears to be based on this principle. A bill was drawn on Williams and Co., bankers, Birchin Lane, London, by the prisoner, and nine days later he uttered it to P. with the false representation that the acceptors were London bankers, Williams, Burgess & Co., of 20 Birchin Lane, a real firm. Eleven judges held this was not forgery or uttering. There was evidence that other bills drawn by the prisoner in the same month had been accepted by Swansea bankers, named Williams & Co., at 3 Birchin Lane, London. Semble this went far to establish the prisoner's good faith at the time of making.

[51] 4 F. & F. 81; 176 E.R. 476.

[52] Of course, if Bowden was in the plot he makes a false document within s. 1 (2) (*c*), and Webb is guilty as an accomplice.

Even in 1819 the case of *Webb* was difficult to distinguish from that of *R.* v. *Parkes and Brown* (1796).[53] There B. (Brown) authorised P. (Parkes) to sign B.'s name as drawer of a bill of exchange. The intention of both B. and P. was to defraud, by passing off the bill as drawn by B.'s brother, a fictitious person, and for this purpose the address of the drawer was written by P., who indeed wrote the entire bill except for certain printed parts, as "Ringhton, Salop." B. then uttered the bill to the prosecutor to obtain shoes, representing that it was drawn by his brother, an army captain, married to a wealthy woman. P. seems to have been the master mind in the conspiracy, judging from his letter of encouragement to B. after his arrest. The jury found P. guilty of forgery and B. of forgery and uttering. Twelve judges discharged P. on a procedural technicality, but affirmed the conviction of B. for uttering only. It was argued for the prisoners that it could not be forgery as P. signed B.'s name with B.'s consent, but it was held that B. of Ringhton, mentioned in the bill, had not consented, and, as he did not exist, could not consent. In *Webb's Case* the court distinguished *R.* v. *Parkes and Brown*, but the report does not state on what grounds. There is no material difference between the two cases if it is remembered that there may be forgery by the hand of an innocent agent. Webb signs Bowden's name with the consent of one Bowden, but not with the consent of Bowden of Romford. Similarly Parkes signs Brown's name with the consent of one Brown, but not with the consent of Brown of Ringhton. The only difference between the two cases may be stated in the following proposition:

He who signs the name of another with his authority to misuse his name and adds a fictitious address to represent a fictitious person makes a false document: *Parkes and Brown*, but he who induces an innocent person to sign his name and adds a fictitious address with the same intent does not make a false document: *Webb*.

This distinction is a tenuous one and involves the negation of the maxim *qui facit per alium facit per se*. There seems no good reason for holding it to be material whether the third party consents to the misuse of his name or not. In either case there is a signature which is *ex facie* true and a false address. The distinction does not seem to have survived section 1 (2) (*c*) of the Act of 1913.

In conclusion, it is noteworthy that all the changes in the law as to false documents under the heads here considered have been extensions of the idea, apart from the suspect decision in *R.* v. *Martin*. The passing of *R.* v. *Webb*, which is signalised by its omission from Archbold, will occasion no regret, as it seems proper that one who writes fictitious names or addresses to documents with intent to defraud should be amenable to the law of forgery. The conflict

[53] 2 Leach 775; 2 East 965; 168 E.R. 488 (C.C.R.). This case was considered by Russell in the earlier editions (see 2nd ed., 1854, Vol. 2, p. 326) to be inconsistent with *Hevey*, an illustration of the width of the principle originally believed to have been established in the latter case.

between *Mead* v. *Young* and *R.* v. *Story* seems to have been settled in favour of the former by section 1 (2) (*c*) of the Act of 1913, and no doubt in the right way. It is to be regretted, however, that the original principle that a document to be false must tell a lie about itself has been qualified by the statutory adoption of the unnecessary decision at *nisi prius* in *R.* v. *Mitchell*, the overruling of *R.* v. *Woodward*, and the eclipse of *R.* v. *Hevey*.

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DISCLAIMER OF CONTRACTS IN BANKRUPTCY

THERE are two provisions in the Bankruptcy Act, 1914, s. 54, by which outstanding contracts may be brought to an end or modified: one is the right of the trustee in bankruptcy to disclaim "unprofitable" contracts, and the other which may be regarded as complementary to disclaimer, is the right of a party who has dealt with a bankrupt to apply to the court to have a contract rescinded. It is only proposed to discuss disclaimer by the trustee in bankruptcy in this article, and further to limit the inquiry to three problems: first, the conflict between a claim for specific performance by the third party where the trustee wishes to disclaim; secondly, the question which arises where disclaimer is opposed on the ground that it will destroy a third party's security; and thirdly the effect of the trustee's failing to disclaim within the time limited by a notice served on him by the third party under section 54 (4).

The first two of these problems are each different aspects of the same generic conflict between the principle that a trustee shall respect existing rights and the policy that, in the administration of an insolvent estate, there should be a power to throw off onerous liabilities so as to prevent one creditor being paid in full where others have to be content with a dividend. Indeed, we can take this further and say that these questions resolve themselves into the distinction between what are often referred to as rights *in rem* and rights *in personam*, using those terms in the anglicised version as referring on the one hand to rights attaching to specific property, and, on the other hand to rights in the nature of personal obligations.

1. DISCLAIMER VERSUS SPECIFIC PERFORMANCE

Both disclaimer and specific performance are of limited application when applied to contracts, for the power of disclaiming contracts applies only to those which are "unprofitable," whilst an order for specific performance will not be granted in a number of instances, such as where the contract relates to a promise of a personal nature, or is such as cannot properly be supervised by the court in its performance. It seems, though there is little judicial guidance on the point, that the two classes of contract under each of the heads of disclaimer and specific performance are, as a rule, mutually exclusive. It is probably true to say that "unprofitable" means, not simply a contract which is a bad bargain, but one the performance of which cannot satisfactorily be carried out by

a trustee in bankruptcy. Thus, Collins L.J. in *Ex p. The Trustee, re Bastable* [1] said that a contract of sale was not included in the class of property to which disclaimer applied, the reason being that the intending purchaser had an equitable interest in the property the subject matter of the contract, and that disclaimer could not be used to destroy that right because of section 54 (2) of the Bankruptcy Act, 1914 (then section 55 (2) of the Bankruptcy Act, 1883) which lays down that disclaimer shall not affect the rights or liabilities of any other person; specific performance was, therefore, available against the trustee in such a case. On the other hand, in *Re Gough, Hanning* v. *Lowe* [2] it was held that a contract to build a house could be disclaimed. But specific performance of a contract under which the bankrupt agreed to *purchase* property cannot be had against the trustee in bankruptcy, since the necessary funds may not be conveniently available (*Holloway* v. *York*),[3] nevertheless if, in such a case, the trustee should disclaim, he cannot recover any deposit paid by the bankrupt (*Ex p. Burrell, re Parnell*).[4]

Some overlapping, however, does occur : disclaimable contracts, and specifically performable contracts are not mutually exclusive in all cases. There are two decisions, one concerning a contract to take a lease, and the other concerning a contract to build (already referred to) both of which are, it will be appreciated, contracts in respect of which specific performance may be granted in some circumstances, and the question arises whether a claim for specific performance overrides the power of disclaimer or vice versa.

In *Ex p. Monkhouse, re Maughan* [5] the bankrupt held certain property under a contract to take a lease. Shortly before the bankruptcy he had contracted to assign the residue of his term to a limited company (apparently formed by himself). The trustee in bankruptcy sought to disclaim the original contract between the bankrupt and the freeholder under which the bankrupt could call for a lease, and the proposed assignees of the residue of the term, the company, were willing for this to be done, and to waive their rights under their contract with the bankrupt. The lessor opposed the disclaimer (since it would put an end to the term), but he did not apply for an order for specific performance of the contract. The case was disposed of on the principle that, since a contract to take a lease is as good as a lease itself, the disclaimer might be allowed on the basis that the trustee was disclaiming "land burdened with onerous covenants" rather than an "unprofitable contract." This decision is, therefore, not of much

[1] [1901] 2 K.B. at 526.
[2] (1927) 96 L.J.Ch. 239.
[3] (1877) 25 W.R. 627.
[4] (1875) 10 Ch.App. 512.
[5] (1885) 14 Q.B.D. 956.

help, except to say that this type of contract is not dealt with as a contract for the purpose of the question whether it is disclaimable.

As to the contract to build : in *Re Gough, Hanning* v. *Lowe* (*supra*) the bankrupt was a builder who had contracted with an owner of land to purchase certain plots of land, and he had also entered into a contract with the appellant to build her a house on one of the plots, and to convey the land with the house on it. The house had not been completed when the builder became bankrupt, and his trustee disclaimed the contract with the appellant. An order was sought by that lady that the contract was binding on the trustee. The first question was whether the promise to build could be separated from the promise to convey the plot of land, it being stated by the court that the contract to build could be disclaimed. The court held that the promises could not be severed, and therefore the appellant had the choice of either taking an assignment of the land, waiving her right to a building on it, in return for the full purchase money of £650 (being the price of the house-plus-land) or allowing the contract to be disclaimed. The first alternative was not accepted, and, of course, was not likely to be unless the house had at least been substantially completed. The next question arose from the fact that the appellant had paid a deposit of £105. As to this, it was conceded that she had a lien on such interest as the bankrupt had in the land, but of course, that interest was subject to the payment of the purchase money (of £126 10s.) due to the owner of the land (a lien obviously of little or no value as a means of getting back any part of the deposit of £105). Hence it was concluded that the trustee could disclaim without affecting the appellant's rights. This decision shows, at any rate, that a contract to build may be disclaimed, and, in view of the narrow application of the remedy of specific performance to building contracts, it probably establishes a rule of general application.

It is to be observed that in both these latter cases disclaimer was allowed; nevertheless it is to be concluded that in a clash between disclaimer and specific performance, it is the specific performance which usually succeeds. For in the first case, disclaimer was allowed only on the basis that it concerned, not a contract to which a remedy of specific performance was applicable, but land itself; whilst in the second case, disclaimer was allowed only after a careful scrutiny of the appellant's rights, and the conclusion that they would not be affected. For a case where the trustee was prevented from disclaiming a contract and specific performance was awarded against him see *Pearce* v. *Bastable*.[6] The fact that the building contract could be disclaimed in *Re Gough* (*supra*) is hardly an exception : it is the grant of an order of specific

[6] [1901] 2 Ch. 122.

performance (where there is no bankruptcy) that is exceptional in this type of contract.

2. CONTRACTS AS SECURITIES

Typical of the second problem is the hypothetical case put by Jessel M.R. in *Ex p. Walton, re Levy*[7] discussed both *arguendo* and in the judgment. It is a case very similar in its facts to *Brice* v. *Bannister*[8] though that case was not specifically alluded to. "Take the case," said his Lordship, "of a contract by a builder to build houses on another man's land, the landowner agreeing that on completion of the houses he will grant leases of them to the builder—a mere contract. The contract is pledged by the builder as security for his own debt . . . and afterwards the builder becomes a bankrupt. Is it to be supposed that the legislature ever contemplated that the equitable assignee of the contract should lose his security by the act of the trustee of the builder in disclaiming the contract?"

But we may ask whether there is any security here, at any rate after the builder has become bankrupt. The pledgee's right is a right to a charge on the leasehold interest of the builder, but it is an interest of a peculiar nature, since it is contingent on the happening of an event depending on the builder. It depends for its fruition on the completion of the contract by the builder, for until the houses are built the lease will not be granted, and so no capital sum can be realised. It may well be that the pledgee, in his contract with the builder, is granted a right to complete the houses if the builder fail to do so, and that right may be available to the pledgee against the landowner, but whether it will be available will depend on whether the contract is personal to the builder and not one which may be vicariously performed.

The matter does not end there, however, for the question then arises, to whom is the lease to be granted on completion of the houses in this manner? Specific performance will not be granted at the instance of the bankrupt,[9] but may possibly be granted in favour of the trustee, if he is willing to enter into the covenants required personally[10] though this point is not free from doubt.[11] But suppose the trustee is not so willing and he disclaims the contract, presumably the pledgee could apply for an order vesting in him the contract to build with its attendant right to claim a lease on completion of the houses, making any necessary provision for any interest which the bankrupt's estate may claim for work done. This, however, puts the pledgee in the position of an original lessee,

7 (1881) 17 Ch.D. 746.
8 (1878) 3 Q.B.D. 569, C.A.
9 *Willingham* v. *Joyce* (1796) 3 Ves. 168; *Buckland* v. *Hull* (1808) 8 Ves. 92; *Neale* v. *McKenzie* (1837) 1 Keen 474.
10 *Powell* v. *Lloyd* (1827) 2 Y. & J. 372.
11 *Weatherall* v. *Geering* (1806) 12 Ves. 504.

a position regarded by many as onerous, and one which he may not be willing to accept.

An alternative course which is available if the trustee has not disclaimed, is for the landowner to apply for rescission of the contract to build (under section 54 (5)); in such an application the court may rescind the contract " . . . on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as to the court may seem equitable . . . ". Although this speaks of payment " by or to the parties " and the pledgee is not a party (it is assumed) to the building contract, the ending phrase does not seem to be limited in that way. In practice the landowner and the pledgee could usually come to terms.

But suppose the trustee does disclaim, does that put an end to the contract altogether? Under the Bankruptcy Act, 1869, it was expressly enacted that a contract which was disclaimed should " be deemed to be determined " and it was, no doubt, against this expression that Jessel M.R.'s rhetoric was directed. But these words do not appear in the current Act, and therefore it is fair to assume that a disclaimed contract does not cease to exist altogether so as, for example, to prevent vicarious performance, especially in view of the provisions of section 54 (2) (*supra*).

There is, however, a separate danger to a security of this type to which the pledgee is prone to fall a victim on the bankruptcy of the contractor, and it may be as well to digress for a moment to point it out. It is this: suppose the trustee decide to complete the contract, carrying on the bankrupt's business for that purpose, what will be the nature of the pledgee's right on the completion of the work? It will be seen that this is a problem on the effectiveness of an assignment of the future profits of a business, and the answer is that such an assignment is not valid against a trustee in bankruptcy, the reason being that a trustee is not bound to carry on the business, and so, if he does, the profits are his, and not the bankrupt's; the right of the assignee-pledgee does not attach to them (*Ex p. Nicols, re Jones* [12]; *Wilmot* v. *Alton* [13]), and it is submitted, that (assuming these cases to be rightly decided) it makes no difference that in the above hypothetical case specific property, as distinct from a money sum, was involved. In *Wilmot* v. *Alton* (*supra*) the bankrupt was a theatrical costumier who pledged her contract to supply and repair the wardrobe for a production; it was held that this was not valid against the trustee as regards sums not due and payable to her at the time of the assignment. It may be added that this does not apply to sums due as personal earnings (in contrast to " business profits ") since a trustee has no control of personal earnings of a bankrupt (*King* v.

[12] (1883) 22 Ch.D. 782, C.A.
[13] [1897] 1 Q.B. 17.

Faraday Partners [14]) and the decision of *Re De Marney* [15] to the contrary must be regarded as bad law.

Such a security therefore, must be regarded as somewhat speculative.

3. Notice to Trustee in Bankruptcy to elect whether to disclaim

The third problem concerns section 54 (4) of the Bankruptcy Act, 1914, which confers a right on any person interested in property which is disclaimable to serve a notice on the trustee requiring him to decide whether he will disclaim or not, giving him twenty-eight days for his decision. It is provided in this subsection that if he do not disclaim he shall, in the case of a contract, be deemed to have adopted it.

It has never been decided whether this makes the trustee in bankruptcy personally liable, or whether he becomes liable in a representative character on behalf of the estate and the creditors in a case where he fails to disclaim and so is deemed to have adopted the contract, but James L.J., said *arguendo* in *Ex p. Davis, re Sneezum* [16] that it seemed that the trustee would be liable "in his official character, *i.e.*, the estate becomes liable." This is important, of course, since although the trustee would be entitled to an indemnity from the estate if he were to be held personally liable, the estate might not be sufficient to meet that indemnity in full. In *Ex p. Davis, re Sneezum* (*supra*) it was held that a trustee may play fast and loose with contracts, abandoning them after he had performed them for a time, but that decision was based on the 1869 Act which did not contain the clause mentioned above to the effect that a trustee shall be deemed to have adopted a contract after failure to disclaim within the time limited when a notice has been served. There was a clause in that Act giving a right to serve such a notice, but this merely barred the right to disclaim and said nothing about adoption. Such a notice had been given in *Ex p. Davis* and the trustee had failed to disclaim within the time. Nevertheless at a later date, finding that he could not conveniently continue the performance of the contract (for the repair of railway wagons) he gave a notice of disclaimer. Although this could not operate as a disclaimer proper because of the provisions of the Act above, it could and did operate as a notice of intention to break the contract. The Court of Appeal held that this could be done, refusing to read into the 1869 Act the words "deemed to have adopted it" which are now in the present Act.

The point at issue is this: that if these words mean that the trustee is personally liable once he has failed to disclaim within the

[14] [1939] 2 K.B. 753.
[15] [1943] Ch. 126.
[16] (1876) 3 Ch.D. 463 at 469.

time limited by the notice, the aggrieved party will claim damages for breach of contract against the trustee personally instead of having to be content with a dividend in the estate, and even if the trustee's liability is not personal but in a representative capacity on behalf of the estate, it will then be contended that the aggrieved party is in the position of a secured, or first priority, creditor to be paid before all the other creditors. If these words " deemed to have adopted it " are to have any meaning it would seem that one of these possibilities is the only logical conclusion.

Summary

Where a contract is of such a nature that a right of specific performance against the trustee is available, disclaimer will be disallowed. There is no right to specific performance of a building contract against a trustee in bankruptcy nor of a contract under which the estate would be called on to pay a sum of money. A contract to take a lease may, however, be disclaimed since it is treated not as an unprofitable contract but as land burdened with onerous covenants.

A contract which is pledged as a security may, no doubt, be vicariously performed by the party interested (subject to the nature of or provision in the contract) and this affords some protection to the pledgee in the case of bankruptcy of the pledgor, but if performance of the contract is by way of carrying on the bankrupt's business, and the trustee decide to do this, he may ignore the security as attaching to the proceeds or outcome of the contract, and the pledgee will be reduced to a non-secured creditor.

If there be a continuing contract and the third party calls on the trustee to elect whether he will disclaim or not, and he do not disclaim, it seems that the third party is then in the position of a secured or priority creditor as regards future performance, so that, on a breach, his damages must be paid in priority to any other creditor.

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POLYGAMOUS MARRIAGES

RECENT decisions [1] on polygamous marriages present an opportunity for the re-examination of the problem of polygamy as it arises in the English courts. It will be submitted that,

(1) the concept of polygamy should be defined so as to include only those marriages where there is a *de facto* plurality of wives;

(2) the potentially polygamous character of the marriage should be determined by the *lex domicilii* of the husband.

The view usually accepted today is that the English courts will, for certain purposes, accord recognition to potentially polygamous marriages.[2] This attitude represents a recognition of the limited character of the judgment of Sir James Wilde (as he then was) in *Hyde* v. *Hyde*,[3] in which an Englishman petitioned for the dissolution of his marriage which had been contracted according to Mormon rites in Utah. His wife, whom he had left in Utah, when he returned to this country, divorced him according to Mormon rites and contracted a second Mormon marriage. Sir James Wilde refused to grant the relief sought, on the ground that a Mormon marriage was potentially polygamous, and that the matrimonial jurisdiction of the English courts only extended to Christian marriage, which he defined as "the voluntary union for life of one man and one woman to the exclusion of all others."[4] He thus assumed that the fact that the marriage was potentially polygamous was sufficient to take it out of the definition. Although the courts no longer interpret Sir James Wilde's judgment as meaning that no recognition at all can be accorded to a potentially polygamous marriage, they still apparently adhere to his view that a marriage is polygamous if it is merely potentially so.

Quite apart from other considerations it should be noted that the definition of marriage adopted by Sir James Wilde did not logically necessitate his treating Hyde's marriage as polygamous. So far as Hyde was concerned his marriage was a voluntary union of one man and one woman to the exclusion of all others, in that at the time of the proceedings, he was a *de facto* monogamist, and had been so throughout his married life. Further it may be pointed out that in treating Hyde's marriage as polygamous and refusing to grant it recognition, Sir James Wilde was ignoring the

[1] *Risk* v. *Risk* [1950] 2 All E.R. 973; *Maher* v. *Maher* [1951] P. 342.
[2] Cheshire, *Private International Law*, p. 404. Dicey, *Conflict of Laws* (6th ed.), p. 224. Schmitthoff, *English Conflict of Laws*, p. 292. Wolff, *Private International Law*, p. 325.
[3] (1866) L.R. 1 P. & D. 130.
[4] At p. 133.

fact that Canon Law, which had been administered by the Ecclesiastical Courts prior to 1857, and which by virtue of the Matrimonial Causes Act, 1857, s. 22,[5] he was obliged to follow, accorded recognition to the first of the wives of a polygamist.[6]

Quite apart from these considerations, however, it should be pointed out that Hyde's marriage was not in fact potentially polygamous. It was monogamous according to any system of law that could conceivably be applied to it. Mormon practices were not the law of Utah.[7] At the time of the proceedings Utah was not a State but a Territory, and as such the law applicable in Utah was U.S. Federal law. Thus if the law of Utah was applicable to the marriage either as the *lex loci celebrationis* or as the *lex domicilii* at the time of the celebration of the marriage, the marriage would have been monogamous, whilst if English law as the *lex domicilii* at the time of the proceedings applied, the marriage was obviously monogamous.

In the light of these considerations it is submitted that there is no good reason for relying on *Hyde* v. *Hyde*[8] as an authority on the definition of polygamy. It will be submitted that the recognition accorded to potentially polygamous marriages in more recent cases has logically necessitated the definition of polygamy as a marriage in which there is a *de facto* plurality of wives.

The fundamental problem in this connection is the meaning to be attached to the term "recognition." This term may mean either,

(1) That a potentially polygamous marriage is treated for some purposes as being equivalent to marriage in English law, or

(2) that a potentially polygamous marriage is accepted as a marriage according to English law.

It is clear that the former view is based on the assumption that monogamy and polygamy are distinct institutions, and not merely forms of the same institution—marriage. If they are considered as but forms of the same institution then it follows that marriage under a polygamous system would, by definition, be marriage under any other system, and from this it follows that the only logical meaning that can be given to the term "recognition" is that the potentially polygamous marriage is accepted as marriage in English law. Once this connotation of the term recognition is admitted it follows that there is no reason in either law or logic for distinguishing between a merely potentially polygamous marriage and a *de jure* monogamous marriage; both are "marriages," and whilst

[5] The section provides that "In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief. . . ."

[6] Letter of Innocent III to the Bishop of Tiberias—Decretals IV, xix, 8; IV, xvii, 15. Quoted by Vesey-FitzGerald in 47 L.Q.R., p. 266.

[7] 2 Beale, *Conflict of Laws* (1935), 700, quoted in Falconbridge, *Conflict of Laws*, p. 654. Vesey-FitzGerald, 1948, *Current Legal Problems*, p. 227.

[8] *Supra.*

the potentially polygamous marriage remains *de facto* monogamous, both are unions of one man and one woman. It is submitted that the only rational justification for distinguishing between monogamy and polygamy is the fact that a purely monogamous system of law is not adapted to be applied *in toto* to a situation where there is a *de facto* plurality of wives, but unless and until there is a *de facto* plurality of wives there is not the slightest justification for the distinction.

We must therefore examine the justification, if any, for the view that monogamy and polygamy are distinct institutions, and then turn to examine the English cases in which recognition has been accorded to potentially polygamous marriages to ascertain whether they are consistent with the proposition that the marriages in question were recognised as marriages in English law.

Considering that "marriage" is an institution common to all legal systems, and considering that the institution whatever form it takes has for its object the regulation of the same aspects of social life it is rather surprising that monogamy and polygamy should be regarded as quite distinct, yet this is clearly the view taken by Martin Wolff. He states "not all the various kinds of marriage existing in different parts of the world are recognised as *marriages* by English law."[9] It is, however, difficult to see why the fact that the husband's personal law allows him the option of taking an additional wife if he so desires should be considered as affecting the essential nature of marriage, which is surely the same whether the marriage be monogamous or polygamous. In *Nachimson* v. *Nachimson*[10] the Court of Appeal rejected the argument that the nature of marriage could in any way be affected by the means available for its dissolution, on the ground that such an argument was confusing the incidents of the contract with its essence. It is submitted that in the same way it is confusing the incidents of the contract with its essence to argue that the nature of marriage can be in any way affected by the existence of the husband's right to additional wives, if he so desires.

We now turn to the cases in which the English courts accorded recognition to potentially polygamous marriages. The first two cases in which recognition was so accorded were peculiar in that in both cases the husbands belonged to sects of Hinduism which prescribed monogamy. In the *Sinha Peerage Claim*[11] a petition was presented by Lord Sinha's son praying for the issue of a writ of summons to the House of Lords. Lord Sinha had married a Hindu in India according to Hindu rites. After his marriage, but before the birth of his son, both he and Lady Sinha joined the Sadharan Brahmo Samaj sect, and Lord Sinha remained in fact a

[9] *Private International Law*, p. 320.
[10] [1930] P. 217.
[11] (1939) 171 Lords Journal 350; [1946] 1 All E.R. 348.

monogamist. Lord Maugham in giving the opinion of the Committee of Privileges in favour of the petitioner stated, " It cannot I think be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our Courts." [12] In giving this opinion His Lordship also enunciated the definition of polygamy for which we are here contending. He stated " It is apparent that great difficulty may arise in cases relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning *a marriage which did not forbid a plurality of wives and where there has been in fact a plurality of wives.*" [13] Further it is clear that one of the factors which influenced Lord Maugham was the *de facto* monogamous character of the marriage, for he said, " Hindu law as your lordships are well aware does not forbid a plurality of wives, but the marriage remained in fact a union between the late Lord Sinha and his said wife to the exclusion of any other spouse. *In other words it was so far as actual fact was concerned a monogamous marriage.*" [14]

In *Mehta* v. *Mehta* [15] the petitioner petitioned for the annulment of her marriage which had been celebrated in India with a domiciled Hindu, on the ground that she thought the ceremony was merely one converting her to Hinduism. The husband belonged to the Arya Samaj sect. Barnard J. assumed jurisdiction on the ground that although the marriage was a Hindu marriage, the fact that the husband belonged to a monogamous sect made the marriage a monogamous marriage. The opinion of an expert witness was to the effect that the husband could, by leaving the sect, regain his right to take additional wives, but regarding this point Barnard J. stated " It is perfectly clear that his marriage was monogamous in its inception and that monogamy was the essence of the contract into which these two parties entered : and I do not think that this Court can look beyond that." [16] Regarding the same point Lord Maugham in the *Sinha Peerage Claim* [17] stated " One of the main tenets of the sect is monogamy, and so long as the late Lord Sinha continued to be a member of the sect he could not contract a second marriage whilst his first wife was alive, which the Indian Courts would recognise as valid. It is no doubt true to say that Lord Sinha could have left the Sadharan Bhahmo Samaj at any time and would then have been at liberty to contract a second marriage during the life-time of his first wife, but it remains true that he never did leave the sect."

[12] At p. 349.
[13] *Ibid.*
[14] At p. 348.
[15] [1945] 2 All E.R. 691.
[16] At p. 693.
[17] (1939) 171 Lords Journal 350; [1946] 1 All E.R. 348.

It is respectfully submitted that it is not accurate to say that the husband could by leaving the sect *regain* his right of taking additional wives. In fact he could at any time have taken an additional wife irrespective of his membership of the sect, but having done so he would be excommunicated therefrom. In each case the husband was a Hindu, and as such governed by Hindu law which allows a plurality of wives. The fact that the husband was also a member of a monogamous sect was not a matter about which the courts had to concern themselves, for the tenets of the Sadharan Brahmo Samaj and the Arya Samaj sects do not form part of the corpus of Hindu law. The position in these cases may be compared with the position of members of the Roman Catholic Church domiciled in England. The fact that the Roman Catholic Church does not allow divorce will not prevent a domiciled Roman Catholic from obtaining a divorce on any ground recognised by English law. It is thus submitted that membership of a monogamous sect does not affect the husbands right to take additional wives and that therefore the marriages in the *Sinha Peerage Claim* and in *Mehta* v. *Mehta* were potentially polygamous marriages, and yet they were treated in all respects as *de jure* monogamous marriages. It also follows from this that if the *de facto* character of the marriage at its inception is to determine its nature, then, there is no reason why all *de facto* monogamous marriages should not be treated as *de jure* monogamous, for all marriages whether potentially polygamous or not are monogamous in inception.

The next case in which recognition was granted to a potentially polygamous marriage was *Srinivasan* v. *Srinivasan*[18] in which an Englishwoman petitioned for the annulment of her marriage which had been celebrated in England with a Hindu domiciled in India, on the ground that at the time of the English ceremony her "husband" was already married to a Hindu woman, the marriage having been celebrated in India according to Hindu rites. Barnard J. expressly following the opinion of Lord Maugham in the *Sinha Peerage Claim* held that the Indian marriage was recognised in this country and that therefore the man was a married man at the time of the English ceremony and consequently incapable of contracting a valid marriage in this country. On similar facts in *Baindail* v. *Baindail*,[19] Barnard J. followed his own decision in *Srinivasan* v. *Srinivasan* and was upheld on appeal to the Court of Appeal.

In *Risk* v. *Risk*[20] where an Englishwoman petitioned for the annulment of her marriage which had been celebrated in Egypt with a domiciled Egyptian, on the ground that it was potentially polygamous, Barnard J. in refusing to exercise jurisdiction attempted to limit the effect of his former judgments in *Srinivasan* v. *Srinivasan*

[18] [1946] P. 67.
[19] [1946] P. 122.
[20] [1950] 2 All E.R. 973.

and *Baindail* v. *Baindail* when he said that all that those cases decided was that "a man who was domiciled in a country which permitted polygamy and had contracted a valid polygamous marriage in that country had the status of a married man according to the law of his domicil and was therefore incapable of contracting a subsequent valid marriage in this country." [21] It is respectfully submitted that his interpretation was neither necessary nor justified. There is no suggestion in either of the judgments that the marriages were being recognised as anything other than as marriages in English law.

In *Srinivasan* v. *Srinivasan* Barnard J. said [22]: "I have come to the conclusion that the textbook view is wrong and relying as I do on the above passage from Lord Maugham's speech, *I ought to recognise this Hindu marriage as a valid marriage*," whilst in *Baindail* v. *Baindail* Lord Greene, after concluding that the respondent was a married man according to Hindu law, said [23]: "On principle it seems to me that the courts are bound to recognise the Indian marriage *as a valid marriage* and as an effective bar to any subsequent marriage in this country." Indeed in those cases they could not logically have been accorded recognition on any other basis. The bar to marriage in this country arises if either party is already married according to English law. There is no evidence that the bar to marriage arises because one of the parties has formed a union that does not amount to marriage so far as English law is concerned.

Further, since *Risk* v. *Risk* [24] was a case in which matrimonial relief was sought from the marriage, the limitation of the previous judgments was in no way necessary for the decision, for in *Srinivasan* v. *Srinivasan* [25] Barnard J. expressly purported to exclude matrimonial relief from the sphere of recognition. It is further submitted that, in any case, the exclusion of matrimonial relief from the sphere of recognition was, so far as *Srinivasan* v. *Srinivasan* was concerned, illogical, since in both that case and *Baindall* v. *Baindall* Barnard J. in fact gave matrimonial relief to the *second* "wife" of a polygamist. We therefore submit that despite the decision in *Risk* v. *Risk* the recognition accorded to potentially polygamous marriages is recognition as marriages in English law and this being so we submit that, as we have already pointed out, the definition of polygamy should logically be such as to exclude *de facto* monogamous marriages and only include marriages "which do not forbid a plurality of wives and where there has been in fact a plurality of wives."

[21] At p. 974.
[22] *Supra*, at p. 69.
[23] *Supra*, at p. 130.
[24] *Supra*, note 20.
[25] At p. 68.

LAW DETERMINING THE NATURE OF THE MARRIAGE

THE other fundamental question which arises in connection with potentially polygamous marriages is the question as to which law determines the nature of the marriage. Two answers are usually put forward :—

(1) the *lex loci celebrationis*,

(2) the *lex domicilii*.

Although the *lex loci celebrationis* is the solution which seems to find most favour in this country,[26] it is difficult to justify its authority. The function of the *lex loci celebrationis* in relation to marriage is the determination of the form of the ceremony.[27] The rights and duties of the parties as married persons adhere to status, and it is surely a firmly established rule of Private International Law that status is determined by the *lex domicilii* of the parties concerned,[28] and therefore it would seem logically to follow that the existence of the husband's right to take an additional wife if he so desires should be determined by the husband's *lex domicilii*.

Becket has pointed out that the determination of the applicable law depends upon whether monogamy and polygamy are regarded as distinct institutions or not. Thus he states [29] "The first of these views (*i.e.*, that the *lex domicilii* applies) proceeds on the assumption that there is but one institution—'marriage'—which includes both monogamous and polygamous marriage. The *lex loci celebrationis* only governs the form of the marriage." Later he states "The alternative view is that polygamous marriage although it shares the name marriage and has many results and incidents in common with monogamous marriage, is an entirely different institution, so different that it is necessary to have regard to the actual ceremony and the *lex loci contractus* not merely to ascertain whether there was a marriage, but also which kind of marriage it was." We have already indicated our reasons for believing that there is no justification for the view that monogamy and polygamy are distinct institutions and we therefore turn to see whether the view that the *lex domicilii* applies is consistent with the English decisions. A number of decisions are cited as being inconsistent with this proposition and these decisions we will now examine.

The first such decision was in *Re Bethell* [30] which was a claim on behalf of the infant son of an Englishman who had "married" a woman of the Baralong tribe of Bechuanaland. The court on finding that a Baralong marriage was potentially polygamous held

[26] Wolff, *Private International Law*, p. 324; Schmitthoff, *Conflict of Laws*, p. 291; Graveson, *The Conflict of Laws*, p. 99; Dicey, *Conflict of Laws* (6th ed.), p. 226.
[27] Cheshire, *Private International Law*, p. 411.
[28] *Re Luck* [1940] Ch. 864.
[29] 48 L.Q.R., p. 352 and p. 356.
[30] (1887) 38 Ch.D. 220.

that it did not constitute a valid marriage from the point of view of the English courts. Since Bethell apparently retained his English domicile throughout, the argument put forward is that the only law that could have made his marriage potentially polygamous was the *lex loci celebrationis*.

It is respectfully submitted that there was no valid marriage at all in this case for the very simple reason that Bethell never intended to contract a marriage in any sense of the term. As the court pointed out Bethell's refusal to be married by an English clergyman who was willing to perform the ceremony, despite the fact that the " bride's " father urged him to do so, was evidence of his lack of intention, and the fact that he kept his " marriage " secret from his English relatives and never introduced or spoke of the woman as his wife lent support to this view, as did the fact that he made special provisions for the maintenance and education of any offspring of the union, whilst under his father's will any legitimate child of his would succeed to the property from which he was receiving an income of £600 p.a. It should further be pointed out that in any case even assuming he had the necessary intention, the marriage would not have been potentially polygamous, even if the *lex loci celebrationis* were the applicable law, for the *lex loci* of Bechuanaland was not Baralong tribal custom, but was in fact Roman-Dutch law [31] as modified by British legislation. From this fact it also follows that the marriage was invalid on the ground that it was not celebrated in accordance with the *lex loci celebrationis*. Baralong custom was retained for the benefit of the native tribes, not for the benefit of the Europeans. Bethell was not a Baralong and no amount of assertion on his part could make him one. Therefore we may conclude that there was no marriage at all in *Re Bethell*, and therefore the decision presents no obstacle to the view that the *lex domicilii* determines the nature of the marriage.

The decision, however, has been defended on the ground that since Bethell was domiciled in England he had no capacity to contract a polygamous marriage.[32] It is respectfully submitted that it is misleading to talk of capacity to contract a potentially polygamous marriage as being distinct from capacity to contract a monogamous marriage. It is clear that such an attitude is based on the assumption that monogamy and polygamy are distinct institutions, a view which we have already tried to show is no longer justifiable. Once it is admitted that monogamy and polygamy are but forms of the same institution it logically follows that if a person has by his or her personal law capacity to marry at all then he or she may marry anyone, whether their personal law permits polygamy or not.

[31] *Keith's Constitutional Law* (6th ed.), p. 531.
[32] Cheshire, *Private International Law*, p. 408.

It may further be pointed out that to attempt to reconcile the decision in *Re Bethell* with the proposition that the *lex domicilii* determines the nature of the marriage is rather illogical, for if Bethell was domiciled in England, then if his *lex domicilii* governed the nature of the marriage the logical conclusion is that this marriage would have been—apart from the considerations mentioned above—a valid *monogamous* marriage. It is, of course, perfectly true that a domiciled Englishman cannot contract a potentially polygamous marriage, because other things being valid, any marriage that he contracts will by the application of his personal law be monogamous. To argue that his attempt to contract a potentially polygamous marriage is invalid presupposes that some factor other than his personal law makes the marriage potentially polygamous.

One of the consequences of the view that the *lex domicilii* determines the nature of the marriage is that the marriage of a man whose personal law permits polygamy will be potentially polygamous wherever it is celebrated, and this it is said is contrary to the decisions in *Chetti* v. *Chetti*[33] and *The Hammersmith Marriage Case*.[34]

In *Chetti* v. *Chetti*, a Hindu domiciled in India married in London a domiciled Englishwoman. She claimed judicial separation on the ground of cruelty. The court granted the relief sought. It is therefore argued that, since the court were prepared to assume jurisdiction over the marriage it could not have been a potentially polygamous marriage, and it could only be so regarded on the basis that the *lex loci celebrationis* determined the nature of the marriage. In fact the point of the possible polygamous character of the marriage was hardly discussed in the case. The main point argued, apart from the question of capacity, was whether jurisdiction in the case of judicial separation could be exercised on the basis of residence alone, and Sir Gorell Barnes stated[35] "Suppose the man met the woman in the street here and began knocking her about, this court would afford her protection. That principle was decided in *Armytage* v. *Armytage*,[36] where although this court could not have granted a divorce it gave the wife the protection she needed." It is respectfully submitted that just as domicile is not necessarily relevant to questions of judicial separation so the polygamous nature of the marriage is not necessarily relevant, and the fact that the point was hardly raised during the case is evidence that the court equally regarded it as irrelevant. Thus it is submitted that the fact that the court granted matrimonial relief in *Chetti* v. *Chetti*[37] in no way commits English law

[33] [1909] P. 67.
[34] *R.* v. *Superintendent Registrar of Marriages for Hammersmith, ex p. Mir-Anwaruddin* [1917] 1 K.B. 634.
[35] At p. 72.
[36] [1898] P. 178.
[37] *Supra*, note 32.

to the view that the *lex loci celebrationis* determines the nature of the marriage.

In the *Hammersmith Marriage Case*, the petitioner, a Moslem domiciled in India, married at an English Registry Office a domiciled Englishwoman. After having been deserted by his wife he purported to dissolve the marriage by *talaq*. On his desiring to remarry the registrar refused to issue a licence, on the ground that he was still a married man. He applied for a writ of mandamus and on that application the issue was tried. The court refused the application, holding that the declaration of *talaq* was ineffective to dissolve his marriage. It would appear from the judgments delivered that the decision was based on two grounds. First, that the English courts would only recognise a divorce effected by means of a judicial decree, second, that the marriage having been celebrated in England was a monogamous marriage, and could not therefore be dissolved by a method of dissolution pertaining solely to a polygamous system of law.

The first ground appears clearly in the judgment of Lord Reading C.J. who stated [38] "Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband and without a decree of a court of law." The judgment of Bray J. is to the same effect. This ground of the decision has been severely criticised by Cheshire [39] and we may agree with his criticism. It places a quite unnecessary limitation on the principle that dissolution of marriage is a matter pertaining to the *lex domicilii* of the parties at the time of the proceedings. If the *lex domicilii* allows divorce without judicial intervention, then it is not for the English Courts to refuse recognition of the divorce on that ground. It should, however, be pointed out that this basis of the decision presents no obstacle to the view that the *lex domicilii* determines the nature of the marriage, as it says nothing whatever regarding the nature of the marriage being dissolved.

The alternative ground of the decision, however, does present an obstacle to that view in that it is necessary to conclude that the marriage was a monogamous marriage. It is, however, respectfully submitted that this ground also places an unnecessary limitation on the firmly established principle that dissolution of marriage is a matter pertaining to the *lex domicilii* of the parties at the time of the dissolution proceedings. Further, it is clear that such an argument is again based on the assumption that monogamy and polygamy are distinct institutions, a view which we have already indicated is no longer justifiable. There is, however, a third ground on which the decision may be defended. It may be

[38] [1917] 1 K.B. 634, at p. 642.
[39] *Private International Law*, p. 485.

argued that the declaration of *talaq* was ineffective not because the marriage it purported to dissolve was celebrated in this country, but because it itself was pronounced in this country. By analogy with the rule that the formalities of marriage must conform with the *lex loci celebrationis* we may perhaps say that the formalities of divorce must conform with the *lex loci dissolutionis*. According to the accepted principles of Private International Law the *locus* of divorce must be the domicile of the parties, and therefore it may be argued that the *talaq* to be effective should have been pronounced in the domicile of the parties, *i.e.*, India.

If this interpretation is accepted it follows that we must regard *Maher* v. *Maher*[40] as being wrongly decided. In that case a marriage was celebrated at an English Registry Office between a domiciled Egyptian and a domiciled Englishwoman. The husband deserted his wife and on his return to Egypt he divorced his wife by *talaq*, the *talaqnamma* being delivered to the wife by the Egyptian Embassy in this country. Barnard J. following the *Hammersmith Marriage Case*[41] held the pronouncement ineffective to dissolve the marriage. Since, however, the divorce was pronounced in accordance with the *lex loci dissolutionis* the *locus* being the domicile of the parties, it is submitted that the pronouncement of *talaq* should have been recognised as a valid and effective divorce by the English court.[42]

Another argument raised against the authority of the *lex domicilii* is based on *R.* v. *Naguib*[43] in which a Moslem domiciled in Egypt was prosecuted for bigamy. He contended that he had married an Egyptian lady in Egypt according to Mohammedan rites in 1898. He subsequently came to England and married a domiciled Englishwoman. In 1913 he purported to divorce his Egyptian wife and married a second domiciled Englishwoman. On prosecution for bigamy in respect of his second English marriage, his plea that his first English marriage was invalid by reason of the existence of his Egyptian marriage was rejected on the ground that he had not sufficiently proved the existence of his Egyptian marriage, and he was convicted. The point, however, is raised that if the *lex domicilii* were held to apply to determine the nature of the marriage, prosecutions for bigamy would be impossible in such cases as the husband would have under his personal law a perfect right to take additional wives. Cheshire indeed concludes that such is the logical conclusion of the application of the *lex domicilii*.[44] With respect it is submitted that the application of

[40] [1951] P. 342.
[41] *Supra*.
[42] The *locus actus* of the *talaq* being Egypt—the country in which it was pronounced. The fact that the *talaqnamma* was received by the wife in this country cannot affect the position, for the divorce is actually effected by the pronouncement of the *talaq*, a *talaqnamma* not being necessary to its validity.
[43] [1917] 1 K.B. 359.
[44] *Private International Law*, p. 414.

the *lex domicilii* does not lead to any such conclusion. The argument to the contrary is based on a failure to distinguish between the existence of the right to take additional wives, and the exercise of that right in this country. The ceremonies of marriage in England are only available to unmarried men, and any person who being married, whether his personal law be polygamous or not, goes through a ceremony of marriage in this country can always be prosecuted for bigamy for the simple reason that the Offences against the Person Act, 1861, s. 57, provides that the offence of bigamy arises whenever a person " who being married, marries any other person during the life of his or her wife or husband." Thus we conclude that the conviction of Naguib for bigamy gives no support to the contention that the *lex loci celebrationis* determines the nature of the marriage.

One final argument against the authority of the *lex domicilii* is that it leads to the conclusion that a Hindu or Moslem who marries in this country has on his return to a country whose laws recognise polygamy a perfect right to take additional wives since the right to take additional wives is one of the incidents of status, and will therefore vary as the *lex domicilii* varies. This conclusion has been disputed on the ground that a person who celebrates his marriage according to the forms of a monogamous system of law is thereafter debarred from taking additional wives on the ground that he has thereby contracted out of the further exercise of his right to take additional wives. Thus in *Lendrum* v. *Chakavarti*,[45] Lord Mackay said that he saw " no juridical difficulty in the concept that a party may by contract debar himself from exercising liberties allowed to him by his personal law." One may agree that there is no juridical difficulty as to the concept, but surely it is difficult to say that any of the forms of marriage permitted by English law amount to a monogamous contract prohibiting a person from the future exercise of the rights allowed to him by his personal law.

There is, however, one limitation on the conclusion that the *lex domicilii* governs the nature of the marriage, provided by the wording of the Offences against the Person Act, 1861, s. 57, which provides that a second marriage will be bigamous whether celebrated in England " or elsewhere " with an exception in the case where the second marriage is celebrated " elsewhere than in England or Ireland by anyone other than a British subject." This section would seem to mean that any British subject, whether his personal law permits polygamy or not, will be guilty of bigamy according to English law, if he contracts a second marriage anywhere in the world. It is evident that the attitude of the criminal law towards polygamy requires fuller investigation than can be undertaken here, but it is clear that this limitation does not apply to

[45] 1929 S.L.T. 96.

non-British subjects who contract their second marriages elsewhere than in England, and their right to take additional wives, whether their first marriages were contracted in England or not is surely indisputable if the proposition that the *lex domicilii* governs the nature of the marriage be accepted.

There remains, in support of the *lex domicilii*, the isolated dictum of Lord Brougham in *Warrender* v. *Warrender*,[46] who stated "An Englishman marrying in Turkey contracts a marriage of the English kind, that is excluding a plurality of wives, because he is an Englishman and only residing in Turkey and under the Mohammedan law only temporarily and accidentally." In conclusion it is submitted that English law is not irrevocably committed to the view that the *lex loci celebrationis* governs the nature of the marriage, in that this conclusion is not necessarily supported by the cases usually invoked in its support, and therefore we submit that it is open to the English courts to pronounce in favour of the *lex domicilii*, the application of which is far more consistent with the principles of Private International Law.

G. W. BARTHOLOMEW.[47]

[46] *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488.

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THE EFFECT OF LIQUIDATION ON CONTRACTS OF SERVICE

THERE appears to be very considerable doubt as to the exact effect of liquidation upon a contract of service between a company and its employee. In particular the effect of a resolution to wind up voluntarily is obscure and the cases as a whole are not easy to reconcile. It is submitted, however, that if they are examined together a principle can be deduced which will explain all the decisions and will indicate the true effect of a resolution to wind up voluntarily.

Re General Rolling Stock Co. Ltd. (*Chapman's Case*) [1] is the earliest case and was concerned with a winding-up order under the Companies Act, 1862. Romilly M.R. in a short judgment said:—

> "The Winding-up Order . . . is notice to all the world of the winding up. The applicant will be entitled to prove for his salary on the footing of having had notice of discharge on the day the order was made."

It will be observed that the crucial date was stated to be the date of the order and not the commencement of the winding up.

Re English Joint Stock Bank, Ltd. (*Ex p. Harding*) [2] was not dissimilar, but in this case a winding-up order was made on May 27, proceedings under it were stayed, a supervision order was made on July 31, and the liquidator gave notice to the servant on August 1. The servant claimed three months' salary in lieu of notice as from August 1 and the question arose whether the order of May 27 had amounted to notice to the servant. Page-Wood V.-C. (as he then was) said, firstly, that if the business did not continue and there was nothing for the clerks to do

> ". . . if the clerks receive notice at or shortly after the making of the winding-up order . . . the discharge may be held to date from the making of the order,"

and secondly, that if the company continued in business so that there was work to occupy the clerks they must continue under the old contract. Thus, even in the first case the judge envisaged some notice other than the winding-up order itself and in the second case allowed the winding-up order no effect at all. In the light of subsequent decisions neither of these propositions will stand.

In *Re Imperial Wine Company* (*Shirreff's Case*) [3] no authorities were quoted and Romilly M.R., without giving any reasons, said:—

> "I am of the opinion that the resolution to wind up the company *ipso facto* put an end to Mr. Shirreff's employment and was equal to his dismissal."

[1] L.R. 1 Eq. 346.
[2] L.R. 3 Eq. 341.
[3] L.R. 14 Eq. 417.

This was the first case in which the effect of voluntary winding up was considered, and since the question was never argued the case is of little authority.[4]

Re Oriental Bank Corporation (*Macdowell's Case*) [5] was a case of compulsory winding up. The servant was entitled by his contract of service to three months' notice : a petition for winding up was presented and a provisional liquidator appointed on May 3. The provisional liquidator gave notice to the servants that, whilst retaining his right of instant dismissal, he would give what notice he could. A winding-up order was made on May 19, and the applicant continued to assist the liquidator until August 19 when he was given notice that his services would not be required after August 31. He claimed for three months' salary as from August 19. Chitty J. followed *Chapman's Case* [6] as an authority for the rule that a winding-up order is notice to all employees and distinguished *Ex p. Harding* [7] on the grounds that in that case the business as such had been continued whilst in the case before him the liquidator had retained the services of the clerk purely to assist in the process of winding up. The learned judge suggested [8] that in all cases it was open to the liquidator and the employee to agree to waive the notice of the winding-up order and continue on the terms of the old employment but found that this had not been done in the case before him.

Reid v. *Explosives Co., Ltd.* [9] was concerned with the appointment of a receiver and manager by debenture holders, and it was held that, on the facts of the case at any rate, the appointment terminated the employment of the company's servants. Esher M.R. at p. 267 argues that an employer who shuts up his business *ipso facto* dismisses his servants, and so the fact of a mortgagee taking possession must have the same effect since it occurs by default of the mortgagor: he then proceeds on the ground that this position is not altered where a receiver and manager is appointed by several mortgagees. Something more will be said about this reasoning later. Fry L.J. whilst concurring in the decision was of the opinion that all depended on the facts of each case and he says [10] :

> "I am not prepared to lay down that every entry by a mortgagee is a dismissal of the servants of the mortgagee from his employment. I think that to see if this has happened we should look at the facts of each case, but in the present case I think the facts show that the entry did determine . . . and was a dismissal."

[4] See Warrington J. in *Midland Counties and District Bank, Ltd.* v. *Attwood* [1905] 1 Ch. 357, 363; *infra*, p. 50.
[5] 32 Ch. 366.
[6] *Supra.*
[7] *Supra.*
[8] At p. 369.
[9] 19 Q.B. 264.
[10] At p. 269.

Thus the headnote to this case stating that the appointment of a receiver does determine contracts of service is only supported by the judgment if one is prepared to accept Lord Esher's opinion and reject that of Fry L.J., and, as will be shown below, Lord Esher's reasoning is open to question.

In *Midland Counties District Bank, Ltd.* v. *Attwood* [11] the point arose whether a resolution for voluntary winding up operated *ipso facto* as a discharge of the servants of the company. Warrington J. accepted that an order for compulsory liquidation put an end to the contract of employment but also accepted the argument that such termination was not brought about by the resultant change in the nature of the business carried on (which in view of *Turner* v. *Sowden & Co.*[12] is an untenable position) but rather by a change in the personality of the employer. The judge took the view that in a compulsory liquidation the business was carried on by the court with the assistance of the liquidator, who is its officer, whilst in a voluntary liquidation the assets remain in the control of the company being administered by its agent the liquidator. On these grounds, and ignoring *Sherriff's Case* [13] since the point had there been assumed and not argued, it was held that a resolution for voluntary winding up did not *ipso facto* operate as a dismissal.

The last mentioned decision came under criticism in *Reigate* v. *Union Manufacturing Co., Ltd.*[14] Scrutton L.J. said [15] that in neither compulsory nor voluntary liquidation is there any change in the personality of the company until it is dissolved; what happens is that a different person is managing the affairs of the company, in one case he is appointed by the court and in the other case by the company. On the same page Scrutton L.J. suggested that a resolution for voluntary winding up may, or may not, be a discharge of the servants according to the facts of the case. Pickford L.J. suggested [16] that on the facts of the case before him the company, by going into voluntary liquidation, had intimated to the other party to the agreement that they no longer had any intention of carrying out the contract.

In *Re Etic, Ltd.*[17] Maugham J. (as he then was) considered the question whether or not voluntary liquidation terminated contracts of service to be an open one.

In *Fowler* v. *Commercial Timber Co., Ltd.*[18] it was not necessary to determine the point since the liquidators gave notice of dismissal on the day that the resolution was passed. Greer L.J. in a dictum [19]

[11] [1905] 1 Ch. 357.
[12] [1901] 2 K.B. 653.
[13] *Supra.*
[14] [1918] 1 K.B. 592.
[15] At p. 606.
[16] At p. 601.
[17] [1928] Ch. 861, at p. 862.
[18] [1930] 2 K.B. 1.
[19] At p. 6.

thought that a resolution to wind up voluntarily must amount to dismissal where that resolution depends upon the company being unable to meet its obligations.

Similarly in *Re Farrar, Ltd.*[20] it was unnecessary to decide the point as the liquidators, on appointment, " forthwith dispensed with the services of Mr. Jell."

There can be no doubt as to the position of the company's servants in the case of a compulsory winding-up order. That order operates as an immediate dismissal to take effect, not from the commencement of the winding up, but from the date of the order. It is open to the servant and the liquidator to agree to waive the notice, and if this is done their agreement will have the effect of a new contract between employee and liquidator upon the terms, as to remuneration, notice, etc., of the old contract between employee and company. Alternatively it is open to the servant and the liquidator to agree that the servant shall remain in the employment of the liquidator on any other terms that may be agreed, for instance on the terms that the employee shall have the same remuneration as before but shall be subject to instant dismissal as was the case in *Macdowell's Case.*[21] Any apparent conflict between that case and *Ex p. Harding* [22] can be explained on the ground that in the earlier case an agreement of the first type could be implied from the facts and in the later case it could not. Chitty J. distinguished *Ex p. Harding* [22] on the ground that there the business was continued and in the case before him it was not. It is submitted that the continuance of the business is not of itself decisive but is a factor to be considered when determining whether or not an agreement of the first kind has been concluded between liquidator and employee.

Whilst there is no question that an order for compulsory winding up operates as an instant dismissal it is necessary to consider why it should do so. In *Ex p. Harding* [22] and in *Macdowell's Case* [21] it would seem to be suggested that the basis is the change in the nature of the business carried on. That ground was rejected in *Attwood's Case,*[23] and in the light of *Turner* v. *Sowden & Co., Ltd.,*[24] where it was held that a complete cessation of business did not terminate a contract of service, it cannot be defended. In *Attwood's Case* [23] it was suggested that the basis was the change in personality of the company but this was decisively rejected by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co., Ltd.*[25] where it was demonstrated that there was no change in personality.

To arrive at the true principle it is necessary to remember that a contract of service is a contract in which both parties have continuing obligations—the one to work and the other to pay wages.

[20] [1937] Ch. 359.
[21] *Supra.*
[22] *Supra.*
[23] *Supra.*
[24] *Supra.*
[25] *Supra*, at p. 606.

Now the effect of an order for winding up is to take the power of dealing with the assets of the company and of carrying out any obligation of the company out of the hands of the company and to put them into the hands of an officer of the court. This being so the company is necessarily unable to fulfil its obligations under the contract of service. The servant must be deemed to know the legal effect of a winding-up order and hence the winding-up order operates as a notice to him that the company cannot continue its obligations to him under his contract of service and thus constitutes a breach going to the root of the contract. This explanation has the added merit of explaining why the termination of the contract dates from the date of the order and not from the commencement of the winding up. What actually effects the dismissal is not the fact of winding up but the notice implied in the making of the order, which, as Romilly M.R. says in *Chapman's Case*,[26] is notice to all the world, that the company necessarily repudiates its part of the contract.

If this explanation of the effects of a winding-up order is accepted it leads to an explanation of the true position when there is a resolution to wind up voluntarily. The effect of such a resolution differs from a winding-up order since its effect is not to take the management out of the hands of the company and put it into the hands of an officer of the court. Before such a resolution is passed the management of the company is in the hands of its officers, the directors: after such a resolution it is in the hands of its agent, the liquidator, and there is no reason whatever why the company should not carry out its obligations under the contract of service acting by its agent, the liquidator. Hence notice of the passing of a resolution to wind up voluntarily is not notice that the company must necessarily repudiate its obligations and so does not automatically result in the termination of the contract.

That is not necessarily to say that the passing of a resolution to wind up voluntarily can never operate as a dismissal. In *Reigate* v. *Union Manufacturing Co.*[27] Pickford L.J. says:—

> "But before the winding up the company intimated to the plaintiff that they could and would not go on unless they obtained additional capital. . . . Having intimated that to him they proceeded to carry it out by going into voluntary liquidation and selling their business. . . . That was to my mind a breach of contract. It was an intimation that they no longer had any intention of carrying out the contract. . . . The voluntary liquidation is only part of the history of the repudiation."

Therefore it may be said that a resolution for voluntary liquidation does not necessarily indicate that the company repudiates the contract owing to its inability to continue to fulfil its obligations thereunder but it may operate as a repudiation if the surrounding

[26] *Supra.*
[27] *Supra*, at p. 601.

circumstances are such that the employee knows that, in fact, the resolution indicates such a repudiation. This view would accord with the above-quoted dictum of Greer L.J. since insolvency which was known to the employee would result in his knowing that liquidation would involve repudiation of the contract.

It is desirable to consider the effect of the appointment of a receiver and manager, not only for the sake of completeness but in order to discuss *Parsons and Others* v. *Sovereign Bank of Canada*,[28] which might otherwise be thought to throw some doubt upon the suggested basis of the rule. In that case there was an appointment of receivers and managers of a paper company which had running contracts for the sale of paper. The receivers and managers continued to supply orders and it was held that they did so under the original contracts and not under new ones made between the managers and the purchasers. Now it may be argued that if contracts of service are ended because, when an officer of the court is appointed to take over the assets of the company, it is put out of the power of the company to fulfil its obligations thereunder then so ought contracts for the sale of paper to be ended. There are two methods of disposing of this argument: the first is to be preferred but the second may be mentioned as it throws some light upon *Reid* v. *Explosives, Co., Ltd.*[29]

The first explanation is that contracts for the sale of paper are contracts which may be vicariously performed whilst contracts of employment, being contracts of personal service, cannot. (See as to vicarious performance of contract *British Wagon Co.* v. *Lea*[30] and *Tolhurst's Case.*[31]) This theory is supported by the judgment of Lord Haldane at p. 167, where he points out that contracts of personal nature may be determined by mere change in possession.

The second explanation depends upon the fact that whilst a receiver and manager and a liquidator may both be officers of the court their functions are quite different: it involves the suggestion, that is, that *Parsons' Case* would have been differently decided had it been a case of a winding-up order. The primary duty of a liquidator in a compulsory winding up is to realise the assets and wind up the company: the primary duty of a receiver and manager is to carry on the business. A receiver must carry out existing contracts on behalf of the company (see *Re Newdigate Colliery*),[32] whilst a liquidator need not and will not unless he thinks it to the advantage of the creditors or contributories.

The interesting point of this second explanation is its application to *Reid* v. *Explosives Co., Ltd.*[29] If it is accepted as true then the appointment of a receiver and manager has the same effect as a

[28] [1913] A.C. 161.
[29] *Supra.*
[30] 5 Q.B.D. 149.
[31] [1902] 2 K.B. 660.
[32] [1912] 1 Ch. 468.

resolution for voluntary winding up. It does not determine contracts of service unless there are other facts pointing to such determination and this is so because it is the duty of a receiver to continue and not to determine contracts so that, in the absence of other circumstances the employee can expect the receiver to adopt the contract. This view is in fact exactly that put forward by Fry L.J. in *Reid's Case*.[33]

This involves the rejection of the headnote to *Reid's Case*,[34] and it also involves the rejection of much of Lord Esher's judgment: however, whatever view is taken of *Reid's Case*, either Lord Esher or Fry L.J. must be rejected since the two judgments conflict. It is respectfully submitted that Lord Esher's argument is of itself faulty. As is seen from the above-quoted summary of his argument, he equates an employer shutting up his business with the appointment of receivers and managers [35] and this entirely ignores the fact that the whole duty of a receiver and manager is not to shut up the business but to keep it going as far as possible.

Summary.

The conclusions reached may be summarised as follows:—

1. Notice of a winding-up order is notice that the company cannot continue to fulfil its obligations under the contract of service and hence operates as a repudiation to determine that contract.

2. Notice of a resolution to wind up voluntarily is not such notice since the company may continue to fulfil its obligations by its agent, the liquidator, but it will be notice if the surrounding circumstances are such that, taken together with the resolution, the employee knows that the company cannot continue to fulfil its obligations.

3. The appointment of a receiver and manager presupposes that he will continue the contracts of the company so far as possible, hence, as in the case of a voluntary liquidation, such an appointment is not notice of determination unless surrounding circumstances combine to make it so.

G. Boughen Graham.[36]

[33] *Supra*, at p. 269.
[34] *Supra*.
[35] At p. 267.
[36] Mr. Graham is a practising barrister.

HABEAS CORPUS APPEALS*

BEFORE the Judicature Act, 1873, appeal did not lie from any order made in habeas corpus proceedings remanding or discharging the person detained.[1] This position has remained, for reasons which will be considered in this article, almost unaffected by that Act and the present law may be summarised as follows:—

(1) No appeal lies from habeas corpus proceedings in a criminal cause or matter;

(2) No appeal lies from an award of the writ; and

(3) Appeal lies in all other cases.

We deal now with each category separately, beginning with appeals in a criminal cause or matter.

I

Section 19 of the Judicature Act, 1873, declares that the Court of Appeal, created by the Act, "shall have power to hear appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or any judges or judge thereof," and the last clause of section 47 of the same Act provides that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save in some error of law apparent upon the record, etc."

The classic definition of a criminal cause or matter was given by Lord Cave L.C. in *Re Clifford and O'Sullivan*.[2] He said: "In order that a matter may be a criminal cause or matter, it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal.' It must involve the consideration of some charge of crime, that is to say, of an offence against the public law, . . . and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offences." A civil cause or matter is a non-criminal one, and covers, therefore, all proceedings which are not criminal within the above definition. In criminal proceedings the defendant is charged with committing a particular crime. This is an obvious statement, but

* The author would like to express his thanks and gratitude to Prof. Glanville L. Williams for reading the manuscript and making many valuable suggestions. Of course, his kindness does not involve him in any responsibility for the views expressed.

1 Although Lord Goddard, in (1949) 65 L.Q.R. 30, limits his observations to appeals in criminal cases the reasons he gives apply equally to other cases of habeas corpus, and Wilmot's opinion, Wilmot pp. 107, 109, is of a general nature. It applies with equal force to prevent appeals in all cases of habeas corpus.

2 [1921] 2 A.C. 570, at p. 580.

it is important to keep it in mind. It is also important to remember that the character of the proceedings is decided by reference to the *proceedings themselves*, and not to any previous proceedings.

Turning now to habeas corpus, one finds that the only object of the proceedings is to question the legality of detention. It does not charge the custodian with the commission of any crime, and the custodian will pass unpunished even if the applicant is discharged. These facts apply to all kinds of habeas corpus proceedings, whether the confinement has arisen in a civil or criminal matter. "Of its very nature," said O'Halloran J.A., "it [the writ of habeas corpus] is a civil right—a transcendent remedy given to every person to invoke the aid of the High Court and the judges of that court to defend his personal freedom in all cases of wrongful confinement." [3] Again, Martin J. said: ". . . it is the remedy which the law gives for the enforcement of the civil right of personal liberty." [4]

The fact that the applicant was detained as a result of a criminal proceeding does not change the character of his application. As said by Waite C.J., delivering the judgment of the Supreme Court of the United States in *Ex p. Tom Tong* [5]: "Proceedings to enforce civil rights are civil proceedings . . . the prosecution against [the petitioner] is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. . . . Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." The Supreme Court of the United States adopted the same view in *Kurtz* v. *Moffitt* (1885).[6] Martin J., of the Quebec Court of King's Bench, said in *R.* v. *Labrie* [7]: "The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime."

Ex p. Tom Tong [8] is of great interest. The Supreme Court of the United States in that case refused to entertain the appeal because the application for a writ of habeas corpus was a civil proceeding although the confinement was due to a criminal prosecution. The petitioner was proceeded against criminally in the police court of San Francisco for a misdemeanour in unlawfully establishing, maintaining and carrying on the business of a public laundry. Being restrained of his liberty under this process, he applied to the Circuit Court of U.S.A. for the District of California for a writ of

[3] *Ex p. Yuen Yick Jun* [1940] 2 D.L.R., at p. 437.
[4] *R.* v. *Labrie* (1921) 61 D.L.R. 299 at p. 309. See also "Annotation" [1926] 2 D.L.R., at p. 6.
[5] (1883) 108 U.S. 556, at pp. 559–60.
[6] (1885) 115 U.S. 487.
[7] Above. This view was adopted by Cannon J. of the same court in *Ex p. Fong et al.* [1929] 1 D.L.R. 223, at p. 237.
[8] Above.

habeas corpus. The judges certified a difference of opinion. Revised statutes provided to the effect that the Supreme Court should have jurisdiction in those cases where a civil suit was instituted before a Circuit Court but only where a final judgment had been reached. In criminal cases no such final judgment was needed. It followed that if the proceeding under consideration were criminal, the Supreme Court would have jurisdiction, but not otherwise. Held, the court had no jurisdiction to entertain the appeal.

The same view prevails in British Columbia, where it is held that habeas corpus proceedings are civil even though confinement was due to criminal prosecution.[9] But the Supreme Court of Canada decided in *Re Storgoff* [10] that habeas corpus is not a civil remedy when used to question a conviction. Commenting on this case, Mr. D. M. Gordon argues that the belief that habeas corpus proceedings are civil may have arisen from confusing the meanings of " civil " in " civil " rights and " civil " proceedings.[11] It is submitted that that is not the case, as shown above.

Nevertheless, English courts have refused to accept the simple and self-evident fact that the nature of any proceedings is determined by the proceedings themselves. Instead of deciding the nature of habeas corpus proceedings by reference to these proceedings, which are started by the prisoner for his own protection, the courts referred to those which the gaoler had instituted or might institute against the prisoner for his conviction. The result was that section 19 of the Judicature Act, which allowed appeals in certain cases from the actual proceedings before the court, was taken to refer to completely different proceedings—proceedings which were not at the time awaiting the decision of the court entertaining the habeas corpus application.

The question of appeals from habeas corpus proceedings in a criminal cause or matter was exhaustively discussed by the House of Lords in *Re Clifford and O'Sullivan*.[12] Reference has already been made to the definition in this case of a criminal cause or matter [13] : it requires the consideration of some charge of crime, and that the charge must be preferred or about to be preferred before some court having or claiming jurisdiction to impose punishment for the offence or alleged offence. In a later case Viscount Simon [14] interpreted these two conditions in the following way: " It is the nature and character of the proceedings in which habeas corpus is sought which provide the test. If this matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an

[9] *Ex p. Yuen Yick Jun* [1940] 2 D.L.R. 432; *R.* v. *Hanna and McLean* [1941] 4 D.L.R. 584; *State of New York* v. *Wilby* [1944] 3 D.L.R. 693.
[10] [1945] S.C.R. 526.
[11] (1945) 23 Can.B.R. 595.
[12] [1921] 2 A.C. 570.
[13] Note (2) above.
[14] *Amand* v. *Home Secretary* [1943] A.C. 147, at p. 156; see also *Ex p. Chapple* (1950) 66 T.L.R. (Pt.2) 932.

alleged offence by a court claiming jurisdiction to do so the matter is criminal. This is the true effect of the ' two conditions ' formulated by Viscount Cave in *Re Clifford and O'Sullivan.*"

It is submitted, with all respect to Viscount Simon, that it is not the character of the proceedings in which habeas corpus is sought that provides the test. His Lordship's first sentence, taken by itself, is misleading, because it refers to habeas corpus proceedings whereas, in fact, reference is meant to be made to consequent or subsequent proceedings.

Re Clifford and O'Sullivan [15] was concerned with an order of prohibition, but the same test that was applied in that case to determine whether the appeal was in a criminal cause or matter applies to applications for the writ of habeas corpus. In that case by a proclamation issued on December 10, 1920, certain counties of Ireland were proclaimed to be under martial law, and another proclamation appointed a date before which arms, ammunitions and explosives should be submitted to the authorities. Any person found after that in possession of such arms, etc., would be liable on conviction by a military court to suffer death. The appellants, Clifford and O'Sullivan, who were civilians, were arrested, tried by a military court, convicted and sentenced to death, subject to confirmation. The appellants applied in the Chancery Division that a writ of prohibition might issue directed to the military court and to the C.-in-C. in Ireland and the military governor, to prohibit them from further proceeding with the trial of the appellants or from pronouncing or confirming any judgment upon them as the result of such trial or from carrying the same into execution or otherwise interfering with appellants, on the ground that the military court was illegal and had no jurisdiction to proceed with the trial. Powell J. refused the application, and the Court of Appeal in Ireland dismissed an appeal, holding that the order of Powell J. was made in a criminal cause or matter within section 50 of the Supreme Court of Judicature (Ireland) Act, 1877, and that consequently no appeal lay.

The House of Lords (Viscount Cave L.C., Lords Dunedin, Atkinson and Shaw of Dunfermline, with Lord Sumner dissenting) held that the order of Powell J. was not made in a criminal cause or matter because the court that convicted and sentenced was not a court-martial but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands, and of advising him as to the manner in which he should deal with the offences. In other words, the second condition postulated by Viscount Cave L.C. was not fulfilled, and the absence of such condition made the order non-criminal and therefore appeal should have been entertained by the Court of Appeal.

[15] [1921] 2 A.C. 570. See also *Amand* v. *Home Secretary* [1943] A.C. 147.

This view of what is a criminal cause or matter is now settled law, having behind it the authority of two decisions of a strong House of Lords. But one may be allowed to make the following observations.

Viscount Cave L.C. thought that the tenor of the authorities led to his two conditions. But in the same case Lord Sumner, dissenting, said [16]: "I regret that I am unable to find any authority, hitherto decided, to support the two conditions which the noble and learned Viscount has laid down, and I think that the words of section 47 (of the Judicature Act, 1873), the tenor of the authorities and the practical working of this statutory definition alike show that the test must be the general quality of the subject-matter against which the proceeding in question . . . was directed." In other words, Lord Sumner supports the first condition and rejects the second. It is submitted, with respect, that Viscount Cave L.C.'s view is the better one, for it gives a wider scope for appeal. The limitations on the right to appeal should be as narrow as possible to enable the subject to have his right to liberty decided by the higher courts.

Viscount Cave's definition of criminal matter as that which involves a charge of crime is not very helpful, and he does not make it easier by explaining that a charge of a crime is a charge against public law, for this, as Kenny points out, still involves the question what is meant by "Public Law." [17] Public law has no recognised and determined field within which criminal law could be easily detected.

These theoretical considerations arise in a relatively small number of cases. Generally speaking, crimes are known and defined and a wrong can easily be "pigeon-holed" in the relevant category. But such a case as *R.* v. *Manley* [18] presents some difficulty because it created a crime which did not previously fit in any of the "pigeon-holes."

The second condition required by Viscount Cave L.C., namely, the necessity of having the charge preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence, is also difficult to state as a satisfactory rule of law. Lord Sumner protested strongly against the introduction of such an element, and asked: "Where everything else is the same, why does that, which would constitute a criminal matter, if the parties prohibited possessed other jurisdiction but not the relevant one, become a matter not criminal at all, because they possess no jurisdiction, not even jurisdiction which is irrelevant?" [19] No reference was made to

[16] *Re Clifford and Sullivan* [1921] 2 A.C. at 588.
[17] *Outlines of Criminal Law*, 15th ed., at p. 4.
[18] [1933] 1 K.B. 529.
[19] *Re Clifford and O'Sullivan*, *supra*, at p. 527.

this requirement in the earlier cases of *R.* v. *Brixton Prison (Governor of)* [20] and *Ex p. Woodhall.*[21]

Perhaps the more serious criticism of this condition is that a prisoner awaiting trial and refused bail has no right of appeal if his application for writ of habeas corpus is refused. True, he cannot be detained indefinitely. Section 7 of the Habeas Corpus Act, 1679, enacted that any person committed for high treason or a felony plainly expressed in the warrant of commitment and who had prayed on the first day of the session to be tried, should be entitled to be discharged if he was not tried in the second assize following even though the trial was postponed because of the absence of a material witness for the Crown. But even this clear provision was brushed aside in at least one case.[22]

It is therefore better for an innocent prisoner to insist on his prosecution rather than on his right to habeas corpus. For if prosecuted and convicted he can appeal, but if he applies for a writ of habeas corpus and his application is refused he cannot. Nor can the prisoner on refusal of habeas corpus appeal to the Court of Criminal Appeal, for he was not tried on indictment. Indeed, it was *he* who started the proceedings.

Criticism, however, can go farther. The courts have given the widest interpretation to the two conditions laid down by Lord Cave. As to the first, it has been held that the wrong committed need not be criminal by English law [23] provided that it is criminal by the law of the country claiming jurisdiction over the prisoner.[24] In such circumstances the proceedings referred to in the second condition can never be started before English courts, for the prisoner committed no crime by English law. The only thing required is that there must be a prima facie case against the prisoner. This leads to a curious result: the prisoner, who committed no wrong according to English law, may be detained with no right to appeal against his detention.

One may be allowed to make a final observation on the distinction drawn by the courts between appeals in a criminal cause or matter and other appeals. As had been seen, the test does not refer to the proceedings in habeas corpus. It refers to proceedings not started by the applicant, and therefore, in fact, it introduces a test outside the real question that had to be considered by the court, namely, the legality of detention. It is submitted, therefore, that what should be considered is the character of the proceedings for securing the writ. Such proceedings are civil in character. Therefore, appeal should always lie in cases of refusal. The question to be determined is the illegality or otherwise of the detention. This is

[20] [1910] 2 K.B. 1056; (1911) 80 L.J.K.B. 57.
[21] (1888) 20 Q.B.D. 832.
[22] *R.* v. *Bowen* (1840) 9 C. & P. 509.
[23] *Ex p. Woodhall* (1888) 20 Q.B.D. 832.
[24] *Amand's Case, supra,* at p. 156.

different from the rights of the gaoler against the prisoner which he might follow through the proper course of the law. But the authorities against this view are so strong that only legislation can alter the present position.[25]

II

The question of appeal against discharge was thoroughly discussed by the House of Lords in *Cox* v. *Hakes*.[26] In that case a clerk having been sued in an Ecclesiastical Court for offences against the ritual of the church and pronounced guilty of contempt and contumacy, a writ *de contumace capiendo* was issued and he was arrested and imprisoned. A rule *nisi* for a writ of habeas corpus having been granted, the Queen's Bench Division made the rule absolute and the clerk was discharged from custody. The Court of Appeal reversed the judgment of the Queen's Bench Division. The House of Lords restored that judgment, holding that no appeal under section 19 of the Judicature Act, 1873, lay to the Court of Appeal from an order discharging a prisoner under a habeas corpus.

The House of Lords thus held that the law was not, in that respect, affected by the Judicature Act. In the court below the opposite view had prevailed. The Court of Appeal had thought that the discharge ordered by the Queen's Bench Division followed a wrong application of the Church Discipline Act, 1840, and that the Court of Appeal had jurisdiction to put the matter right and give the proper interpretation to the statute. The House of Lords did not discuss that point in particular, because the view was that discharge precluded appeal.

Section 19 of the Judicature Act, 1873, in general terms provides that appeal lies to the Court of Appeal from a judgment or order of the High Court except in those cases contained in section 47. The natural construction of that provision, in the view of the Court of Appeal, was that in all cases not within section 47 appeal lay to the Court of Appeal. This wide interpretation of the section was supported in the House of Lords by the dissenting Lords, Lords Morris and Field.

As already said, the House of Lords did not subscribe to this interpretation. The majority of their Lordships thought that an existing right of the subject, namely not to be liable to appeal against discharge, could not be destroyed by the general words of the section. More definite legislation was needed for that. In support of their conclusion, their Lordships advanced a variety of arguments : section 19 of the Act should not be interpreted literally but rather more stringently [27] ; it should not be read in isolation from other parts of the Act which gave the Court of Appeal no power

[25] For further discussion see *Annotation, Constitutionality of Appeals in Habeas Corpus*, by R. M. Willes Chitty [1926] 2 D.L.R. 1.
[26] *Cox* v. *Hakes* (1890) 15 App.Cas. 506.
[27] *Cox* v. *Hakes*, *supra*, at p. 517.

to order the re-arrest of a person discharged,[28] and the Court of Appeal could not add to its powers by relying on Ord. 58, r. 4[29]; there is no one whom the court would be bound *ex debito justitiae* to hear on appeal[30]; if appeal were allowed discharge would cease to be final and that would produce an unwarranted change in the meaning of section 3 of the Habeas Corpus Act, 1816[31]; reversal on appeal might possibly be futile because the subject could still apply to other courts for his discharge.[32] One cannot but admire their Lordships' untiring search for arguments to preserve an existing right, but so sweeping were some of the reasons given that they would equally prevent an appeal where the writ has been refused. Lord Bramwell perceived this and said: "My reasons would, perhaps, apply to a case where the prisoner had been remanded, but I limit my opinion to where he has been discharged."[33]

The House of Lords, further, refused to exercise its appellate jurisdiction to entertain an appeal in a case of discharge, although wide powers had been given to it under the Appellate Jurisdiction Act, 1876. Such general terms, the House held, cannot deprive the subject of an ancient and universally recognised constitutional right.[34]

It was urged in the later case of *Secretary of State for Home Affairs* v. *O'Brien*[35] that the *ratio decidendi* of the judgment of the House of Lords in *Cox* v. *Hakes* was that appeal did not lie because the prisoner was in fact discharged. And indeed the reasons given by their Lordships might lead to that conclusion. But the House held in *O'Brien's Case* that what was important and decisive was the order of discharge. It made no difference that the person was still in custody, for that did not prejudice and should not prejudice his right to immediate freedom as decided by the court issuing the order of discharge.[36]

This discussion, however, will not be complete without reference to some cases which, prima facie, lead to the conclusion that appeal lies against discharge. In view of the decision of the House of Lords, these cases can now be supported only on more limited grounds. Re-arrest was ordered in *Dugdale* v. *Reg.*[37] where a misdemeanant, convicted and sentenced, was allowed bail on a recognisance which did not comply with the requirements of the

[28] *Ibid.* at p. 529.
[29] *Ibid.* at p. 531.
[30] *Ibid.* at p. 519. But see the court below, 20 Q.B.D. at p. 14.
[31] *Ibid.* at p. 519.
[32] *Ibid.* at p. 524.
[33] *Ibid.* at p. 526.
[34] *Secretary of State for Home Affairs* v. *O'Brien* [1923] A.C. 603, *e.g.*, *per* Lord Dunedin at pp. 620–21.
[35] *Ibid.*
[36] See also the Irish case, *The State* (*Burke*) v. *Lennon and Att.-Gen.* [1940] Ir.R. 136, 157; the British Columbia case, *Re Hoessan Rahim* [1912] 4 D.L.R. 701.
[37] (1853) 2 E. & B. 129.

statute. The House of Lords in *Cox* v. *Hakes* thought that re-arrest was ordered because the judge who ordered discharge acted without jurisdiction.[38] With great respect, the reason given by the court itself, the Court of Exchequer Chamber, was that the judge misapplied the law,[39] a reason which makes the case on all fours with *Cox* v. *Hakes*.[40]

The Privy Council too, in a series of cases entertained appeal against discharge.[41] The House of Lords in *Cox* v. *Hakes* thought that the Privy Council's powers to enforce its judgments were very different from those conferred on the Court of Appeal, and that the relation of the Queen in Council to the colonial courts differed altogether from the statutory relation of the Court of Appeal and the High Court of Justice.[42] These cases, therefore, cannot be relied upon in English courts to justify appeal against discharge.

Another case to be distinguished is the House of Lords case of *Barnardo* v. *Ford*.[43] In that case, on the application of the mother for the custody of her child who was at an institution run by Dr. Barnardo, the Queen's Bench Division made absolute an order *nisi* for a writ of habeas corpus and the Court of Appeal affirmed the order. On a further appeal the House of Lords held that such an order was within the meaning of section 19 of the Judicature Act, 1873, and that an appeal lay from the making of the order to the Court of Appeal.

In *O'Brien's Case* [44] the House of Lords explained their judgment in *Barnardo's Case*. They said that no question was raised, or intended to be raised in that case as to the legality of detention. The sole question was whether the writ was directed against the proper person. The result of granting an appeal was only to allow further consideration of that question, not to raise again a question of legality which had been already determined. The child had been sent by Dr. Barnardo to Canada to a person who was outside the control of Dr. Barnardo and the writ should have been issued against this person. The power of re-arrest was not considered, probably because the child was outside the control of the mother, Dr. Barnardo and the court itself.

Barnardo v. *Ford* [1892] A.C. 326 was explained by the Court of Appeal of British Columbia in this way [45]: "It was held that an appeal in habeas corpus was within the section [19] where the appeal was not from an order discharging the person, but from one

[38] *Cox* v. *Hakes*, *supra*, at pp. 521, 525, 530.
[39] *Dugdale* v. *R.*, *supra*, at pp. 131–132.
[40] See also Lord Goddard, "A Note on Habeas Corpus" (1949) 65 L.Q.R. 30, 36.
[41] *e.g.*, *Att.-Gen. for Hong Kong* v. *Kwok-a-sing* (1873) L.R. 5 P.C. 179; *Reg.* v. *Mount* (1875) L.R. 6 P.C. 283; *Att.-Gen. for the Dominion of Canada* v. *Fedorenko* (1911) 27 T.L.R. 541. See also N. Bentwich, "Habeas Corpus in the Empire" (1911) 27 L.Q.R. 456.
[42] *Cox* v. *Hakes*, *supra*, at p. 535.
[43] [1892] A.C. 326.
[44] [1923] A.C. 603.
[45] *Per* Macdonald C.J.A. in *Re Hoessan Rahim* (1912) 4 D.L.R. 701, p. 702.

granting a writ of habeas corpus although there was no inherent right of appeal." [46]

III

In all other cases where an application for a writ of habeas corpus has been refused an appeal lies, because the power of the Court of Appeal to entertain appeals in such cases was not excluded by section 47 of the Judicature Act, 1873, from the general power of appeal contained in section 19. Thus an appeal was entertained from refusal of a Divisional Court to issue a rule *nisi* for a writ of habeas corpus in the case of a German national who was interned as a prisoner of war.[47] Of the three Lords Justices who decided the case only one, Swinfen-Eady L.J., raised the question whether an appeal would lie, and he left the question open. It is submitted, however, that the case clearly was not in a criminal cause or matter.

Again in *R.* v. *Halliday* [48] Zadig was a person of hostile origin but had since become a naturalised British subject. He was interned under Reg. 14B of the Defence of the Realm (Consolidated) Regulations, 1914, which empowered the Secretary of State to order the internment of any person of " hostile origin or association." The Divisional Court discharged a rule *nisi* for a writ of habeas corpus and Zadig appealed. The Court of Appeal entertained the appeal and no question of jurisdiction was mentioned by counsel or court.

In *R.* v. *Secretary of State for Home Affairs, Ex p. O'Brien,*[49] the House of Lords upheld the judgment of the Court of Appeal entertaining an appeal from a refusal to issue a writ.

In neither case was the question of jurisdiction discussed. Lord Goddard [50] suggests that the Court of Appeal in *O'Brien's Case* apparently relied upon Ord. 58, r. 10, as giving them jurisdiction to entertain the appeal. That rule provides that where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal. But none of the learned judges mentioned the Order, for the question of jurisdiction was not discussed, and if the Court of Appeal has no jurisdiction it cannot enlarge it by reference to an Order. The court derives its jurisdiction from the Judicature Act, 1873, and the proposition that the Court of Appeal cannot by an Order increase its powers was one on which the House of Lords placed great reliance in the case of *Cox* v. *Hakes* discussed above. It is submitted that the true reason is that appeal is governed by the Judicature Act.

A. M. Qasem.[51]

[46] Irish law is the same as English law. For a learned article on the subject see (1940) 74 Ir.L.T. 1. The amendment to the Constitution, it is submitted, did not change the law in this respect.
[47] *Ex p. Weber* [1916] 1 K.B. 280.
[48] [1916] 1 K.B. 738.
[49] [1923] A.C. 603.
[50] (1949) 65 L.Q.R. at p. 31.
[51] LL.M.(Lond.); barrister-at-law.

STATUTES

Courts-Martial (Appeals) Act, 1951

This Act deals with two matters: Part I provides for appeals from courts-martial and Part II makes changes in the method of appointment, qualifications, tenure of office, salaries and pensions of the Judge Advocate General and his assistants. The Act applies to the three branches of the forces with unimportant differences and this note ignores the special provisions relating to the Royal Navy.

A Courts-Martial Appeal Court is set up. Its judges are (a) the L.C.J. and the puisne judges of the High Court, (b) Lords Commissioners of Justiciary nominated by the Lord Justice General, (c) judges of the High Court in Northern Ireland nominated by the L.C.J. of Northern Ireland, (d) other persons of legal experience appointed by the Lord Chancellor. The court, which may sit in two or more divisions, is duly constituted if it consists of an uneven number of judges, not being less than three. When the court is sitting in the United Kingdom, at least one member must be drawn from (a), (b) or (c) above; the Lord Chancellor may waive this requirement when the court is sitting elsewhere. Majority opinions prevail.

Under the procedure previous to this Act, there were three types of review of a court-martial finding of guilty. First, there was the review by the higher military authority which decided whether or not to confirm. Secondly, there was the review by the J.A.G. who was concerned primarily to see that the trial had been properly conducted. Thirdly, the prisoner could petition His Majesty for mercy asking for reduction of the sentence or for quashing the sentence. The Lewis Committee, whose recommendations (Cmd. 7608) were considered in Vol. 12 of this *Review* (at p. 223), suggested that a courts-martial appeal court should be substituted for the confirmation and for the review by the J.A.G. The Act, however, keeps the earlier types of review and adds the new court as a fourth stage. Except in the case of a conviction involving sentence of death, the right of appeal to the new court is not exercisable unless the prisoner, within a prescribed period, first petitions the Admiralty or the Secretary of State praying that his conviction be quashed and either the petition is not granted or a further period elapses. The court has, in any case, the right to refuse leave to appeal and must, in considering whether or not to refuse leave, have regard to any expression of opinion made by the J.A.G. that the case is a fit one for appeal.

The Lewis Committee recommended that appeals should be on questions of law alone but the Act makes no such limitation. The

court must allow the appeal if they think that the finding of the court-martial is unreasonable or cannot be supported on the evidence or involves a wrong decision on a question of law or that, on any ground, there was a miscarriage of justice. The court is empowered to dismiss the appeal if, although the point raised might be decided in favour of the appellant, they consider that there has been no substantial miscarriage of justice. From the decision of the court there can be a further appeal to the House of Lords if either side applies to the Attorney-General and he gives a certificate that a point of law of exceptional public importance is involved and that a further appeal is desirable in the public interest. The Act follows the recommendations of the Lewis Committee in not allowing any appeal against sentence. But it goes further than those recommendations in empowering the court to grant legal aid to an appellant whose means are insufficient. The court or the House of Lords on allowing an appeal may award costs to the appellant of such sums as appear to the court or the House to be reasonably sufficient compensation. The court on dismissing an appeal may order the appellant to pay costs. The J.A.G. may refer the finding of a court-martial to the court if he thinks a point of law of exceptional importance is involved; the Admiralty and the Secretary of State have the same power if they think the reference to be expedient having regard to matters which were not brought to the notice of the court-martial.

It will be seen that, as the Secretary of State said on the Second Reading of the Bill, this court is modelled on the Court of Criminal Appeal. Under the Act of 1951, however, leave to appeal can only be granted by the Appeal Court and must be obtained for appeal on questions of law as well as other questions. No provision is made concerning the pronouncement of judgments. The rules of court which may be made under the Act of 1951 have not yet been published and it is not therefore clear to what extent the prisoner or the Appeal Court will be provided with the reasons on which the court-martial arrived at its decision. Another difference between the two courts is that, under the Act of 1951, the appellant is not, without special leave or in accordance with the rules of court, entitled to be present at the hearing of the appeal.

The Bill was welcomed on both sides of the House of Commons but the Second Reading debate was somewhat restricted in scope because of rulings by the Speaker and two Deputy-Speakers which excluded discussion on courts-martial themselves and on the recommendations of the Lewis and Pilcher Committees. Criticism of the Bill was, however, voiced by Mr. Blackburn who regarded the Bill as " grossly and utterly inadequate "; his main reasons were that no jury is called on to determine the guilt of the prisoner at any stage and that the decision of the Court of Appeal ought to be unanimous.

The effect of this first Part of the Act seems likely to depend very largely on the way in which the power of the Judge Advocate General to review decisions is carried out. As has been said above, the Lewis Committee suggested that the Court of Appeal should replace this review. The act, however, retains it, because, said the Secretary of State, " we feel that, even in the new circumstances, this will be of great value in acting as a filter so that the Appeal Court should not be overladen." In the previous note in this *Review* (referred to above) I invented the story of Pte. Koons who absents himself for a fortnight with every intention of returning but who on his return faces a charge of desertion rather than absence without leave because a spate of such absences makes the more serious charge necessary for reasons of discipline. The intention to return should defeat the charge of desertion. Suppose, however, that Pte. Koons is convicted of the charge. He wishes to appeal on the grounds (1) that as a matter of fact, he intended to return and (2) that, therefore, as a matter of law, he was not guilty of desertion. What must he do? First, he must wait to see if the decision is confirmed by the higher military authority. Secondly, if it is confirmed, he must petition the Secretary of State praying that his conviction be quashed. What is not clear is whether the Secretary of State in fact acts at this stage on the advice of the J.A.G. whose department will be considering the decision to ensure that the court-martial was properly carried out. It seems probable that the Secretary of State will follow this course. Thirdly, on the refusal of the Secretary of State to quash the decision, Pte. Koons must apply to the court for leave to appeal. The court, as said above, is required to have regard to any opinion of the J.A.G. that the case is a fit one for appeal. Again, what will happen in practice is of great importance but is obscure. Will there normally in each case be a communication between the court and the J.A.G. in which the latter will state whether or not he wishes to declare his opinion that the case is a fit one for appeal? How far will the court rely on the expression of this opinion or its absence as the determining factor in the decision whether to allow leave to appeal? The dangers are clear. First, if the Secretary of State does act on the advice of the J.A.G. in deciding not to quash the conviction on petition, the J.A.G. in considering later whether the case is a fit one for appeal will be in a somewhat difficult mental position. Secondly, and more importantly, since the purpose of retaining the review by the J.A.G. is to protect the court from being over-laden, too great reliance by the court on the J.A.G.'s opinion that the case is a fit one for appeal or the absence of this opinion, can easily jeopardise the whole of this Part of the Act. If it becomes known that the J.A.G. in effect determines whether leave to appeal is to be granted, a new form of dissatisfaction will replace the old. There is surely a strong case for following the practice of the Court of Criminal Appeal and allowing appeals on questions of law to be as

of right and in any other case to allow the court-martial to give leave to appeal. Where the members of the court-martial are not unanimous in their opinion, there should in any case be a right of appeal to the court. More could be done, without burdening the court too much, to reduce the number of occasions on which Pte. Koons can complain "I wanted to appeal but the army wouldn't let me."

Part II of the Act makes certain charges with respect to the office of the J.A.G. Future appointments to this office are to be made by His Majesty, on the recommendation of the Lord Chancellor, instead of the Secretary of State. To assist the J.A.G. the Lord Chancellor may appoint a Vice Judge Advocate General, and deputy Judge Advocates. At least ten years', seven years' and five years' standing as a barrister is a condition of appointment to these offices respectively. The Lord Chancellor may dismiss for inability or misbehaviour and the normal age for retirement is 70 years in the case of the J.A.G. and 65 years for the other officers. Salaries and pensions are provided for. The function of prosecuting is performed by the departments of the Secretary of State so that the department of the J.A.G. is now entirely judicial.

Any similarity between the abbreviations above and the initials below is purely coincidental.

J. A. G. Griffith.

NOTES OF CASES

Licences in Administrative Law—Retrospective Effect—Licence by Estoppel

The House of Lords managed to do justice in *Howell* v. *Falmouth Boat Construction, Ltd.* [1951] 2 All E.R. 278, but in a way that may, with every respect, be said to invite trouble in future cases. It was held, reversing the Court of Appeal (see *ante*, Vol. 13, p. 376), that a licence under the Defence (General) Regulations, 1939, had to be in writing; thus an oral permission was of no avail. In order to mitigate the effect of this interpretation the House held that a subsequent written licence might on the construction of the particular regulation be retrospective, despite the general principle that a licence cannot be retrospective (see *Sovfracht* v. *Van Udens Scheepvaart* [1943] A.C. at 218). Thus when another case of this kind arises everything will turn on two questions : whether the oral permission has been subsequently confirmed in a written licence which can be construed to be retrospective, and whether an intention to validate such a retrospective licence can be spun out of the words of the legislation.

It is a pity that Denning L.J.'s decision in the Court of Appeal, [1950] 1 All E.R. 538 (see 13 M.L.R. 376), found no favour with their Lordships, for he propounded a bold and imaginate solution that held great possibilities of development. The learned Lord Justice said that even if a written licence were legally requisite, the repairers did not act illegally since " whenever government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume." Although this principle was stated with reference to governmental " authority," it could have been developed to include every case where the defendant was assured by a government agency that his act was legal, and so have afforded a welcome relief from the rule that ignorance of the law is no excuse. Lord Simonds said he knew of no such principle in our law as that stated by Denning L.J., nor was any authority for it cited. It is true that there was no previous English authority for Denning L.J.'s principle, or for the wider version of it just suggested; but there was good American authority. As an American writer puts it, " confidence in the government itself would be seriously undermined if citizens should be punished for apparently innocent deeds done in bona fide reliance upon the advice of officers who are authorised by the state to give such advice " (Perkins in (1939) 88 U. of Pa.L.Rev. at 43; and see Dession, *Criminal Law, Administration, and Public Order*, 578–9;

Michael and Wechsler, *Criminal Law and its Administration*, 796; Hall, *Criminal Law and Procedure*, 557–8).

The effect of *Howell's Case* seems on its face to be that a ship-repairer who acts in bona fide reliance upon an oral governmental permission is defeated if no written licence is subsequently issued; he is therefore at the mercy of the government in the meantime. Is this an example of the "rule of law"? The most that Lord Normand (who spoke in effect for the House) would concede was that where the Crown had power to grant a retrospective licence and did so, the omission of an item from the licence would not be fatal to the contractor's action on a contract in respect of that item, if the proper officer came forward to depone that all the work done had in fact his authority. It may be noted that this rule, though required by justice, had no more specific English authority behind it than Denning L.J.'s principle. Also, it is hard to see why it should be so hedged about with limitations. Why should the government officer have to depone that he gave his oral assent, if there is satisfactory evidence aliunde that the assent was given? And why should the rule be confined to a case where a written retrospective licence is given but an item omitted: why should it not extend to a case where no written licence is subsequently given, or where a written licence is given that is stated to be non-retrospective? Perhaps Lord Normand would have been willing to extend the rule in this way. But if so, the rule becomes that an oral permission is good without a subsequent retrospective licence if the government have power to issue such a retrospective licence. It is difficult to comprehend the reason for the condition.

To return to Denning L.J.'s principle, it could have been supported (as he apparently supported it) as resting on an estoppel or quasi-estoppel binding on the Crown. Another instance of an estoppel in criminal law is the defence of autrefois convict or acquit. The former notion that the Crown cannot be bound by an estoppel in pais is now exploded (Spencer Bower, *Res Judicata*, 129; Williams, *Crown Proceedings*, 110–111). Alternatively, the officer of the Crown could have been regarded as having authority to state "the law" for the purpose of the rule that ignorance of the law is no excuse (cp. Jerome Hall, *General Principles of Criminal Law*, 362–3). An interesting result of Denning L.J.'s view if it had been accepted is that the soldier's defence of superior orders would have fallen neatly into place. There is no sufficient reason for distinguishing between a soldier who acts under seemingly lawful orders and a citizen who acts under seemingly lawful governmental authorisation or advice.

Another line of authority in the United States is to the following effect. Where the defendant acted in reliance on a case that had decided a prohibitory statute to be unconstitutional, and this case was overruled by a superior court after the defendant acted, his ignorance of the law (resulting as it did from a decision of the

court) is a defence to a criminal charge. See *State* v. *O'Neil* (1910) 147 Iowa 513, 126 N.W. 454, 33 L.R.A. (N.S.) 788, reprinted in Harno, *Cases and Materials on Criminal Law and Procedure*, 67 (and see *ibid.*, 69, n. 2); Michael and Wechsler, *op. cit.*, 796; Mikell, *Cases on Criminal Law*, 3rd ed., 568; Hall, *Criminal Law and Procedure*, 551; cp. (1911) 9 Mich.L.Rev. 334. The question may arise in England with regard to delegated legislation that is first held to be ultra vires and later held intra vires. The principle, if valid, would logically apply to an act done in reliance on subordinate legislation that has not been before the courts, which is held ultra vires after the defendant has acted (cp. Perkins, *op. cit.*, at 43-5; but see Michael and Wechsler, *op. cit.*, 797), or in reliance on a case declaring the common law, which case is later overruled.

The reason usually given for the American exception is that conviction in such circumstances would be manifestly unfair, and this seems to be reason enough. Those who prefer may accept the suggestion of Hall, *General Principles of Criminal Law*, 360, that there is not in such circumstances a mistake of law. The law, for the purpose of the rule, is as it appears to be laid down by the legislature, or by the courts in decisions that are valid for the time being.

If the exception is valid, it would seem to apply to the defendant who is charged in the case in which the overruling decision is given. This defendant must therefore be acquitted, although the court expresses its opinion that the law under which he is charged is valid. Presumably this expression of opinion will be binding under the doctrine of precedent, although it does not directly lead to the determination of the issue.

If an argument along these lines is accepted, it comes very close to settling the point in *Howell's Case*. The oral permission in that case was very like a piece of ultra vires delegated legislation, and the repairers' reliance on it should therefore have excused them from a criminal charge. This should have been enough to exclude the plea of illegality in contract.

There seem to have been only two English authorities on the general question before *Howell's Case*. In *Dennis & Sons* v. *Good* (1918) 88 L.J.K.B. 388, it was held that an order of the Board of Agriculture to plough a field was no excuse to a farmer for ploughing up a footpath. The order did not specifically purport to authorise the ploughing of footpaths, so that the present question hardly arose; but Avory J. seemed to think that even if the order had so purported, it would have been no defence, because ultra vires. This view creates an unnecessary injustice. The opposite view would not give the government carte blanche to authorise breaches of the law, because (1) the defence would apply only where the government order created a mistake of law, and (2) the order would be no defence to an action in tort. The existing powers of the

government are so great in respect of the administration of the criminal law that it is hardly any check upon a government bent upon an illegal course of conduct; it is the civil law, if anything, that provides such a check. There is therefore no political danger in allowing the subject a defence to a criminal charge.

An indication that the criminal courts may come to proceed upon these lines is supplied by the second case, *R.* v. *E. Walcot Bather, Ltd.*, The Times Newspaper, July 17, 1950, 94 S.J. 582, [1950] C.L.Y. 441. The Minister of Health had issued a circular stating that the value of work done by the licensee with his own hands should not be taken into account in issuing a building licence; but in a prosecution for exceeding a licence by the value of such work it was actually argued for the Crown that the circular had not the effect of law and was only a matter of mitigation. The Court of Criminal Appeal apparently accepted this view, but exercised its discretion to discharge the accused without punishment. This power to discharge without punishment blurs the line between what is a matter of defence and what is matter of mitigation in criminal law. The chief practical difference is that it is discretionary to discharge without punishment, and different judges may go different ways in the exercise of the discretion. It is therefore to be hoped that the criminal courts will be able to develop a defence on the lines of the American authorities, so that the freedom of the subject in circumstances like these does not depend on judicial discretion. Yet it seems that the criminal courts can now do this only if they are bold enough to leave the remarks in *Howell's Case* on one side as remarks made in a civil case and on the civil law.

This leads to the question whether any distinction can properly be drawn between criminal and civil law. In civil law the merciless rule still acted upon by the courts is that stated by Lord Simonds in *Howell's Case*: "What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action." No satisfactory reason has ever been advanced for a rule stated in these sweeping terms. It seems to be accepted as a self-evident truth, which it certainly is not. The effect of the rule is to impose upon the contractor a forfeiture of the whole contract price, notwithstanding that he was acting in good faith and notwithstanding that when charged in a criminal court he is merely fined a trifling sum or discharged without penalty. When the whole tendency of criminal administration is towards individualisation of punishment, why should the civil courts maintain this arbitrary forfeiture? It is arbitrary because its amount is affected not by the innocence of the plaintiff or the guilt of the defendant but solely by what happens to be outstanding under the contract.

Will the rule be applied if the plaintiff has literally contravened an Act of Parliament in circumstances that give him a defence to a criminal charge? He may, for example, have acted under a

mistake of fact, or under duress. Surely in such a case he ought to be allowed to recover in an action on the contract. But if the civil courts thus take account of what is an absolute defence to a prosecution, why do they not take account of matter that may be advanced in mitigation, especially when it goes so much in mitigation that the criminal court will discharge without punishment?

GLANVILLE WILLIAMS.

POLICY AND DISCRETION IN LICENSING FUNCTIONS

To what extent, if at all, are licensing justices entitled to adopt a general rule for the future guidance of their attitude to a particular class of application? This question has been before the courts on a number of occasions, and until the ambiguous judgments in *R.* v. *Rotherham Licensing JJ., ex p. Chapman* [1939] 2 All E.R. 710, the law seemed reasonably clear. Doubts created by that case have now been removed by the Divisional Court in *R.* v. *Torquay Licensing JJ., ex p. Brockman* [1951] 2 K.B. 784. The true position was succinctly stated by Lord Goddard C.J., who delivered the judgment of the court: "The justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule but are bound to consider whether it is applicable to any particular case" (at p. 789). In other words, although they have a duty genuinely to exercise a discretion by considering each individual case on its merits, the due discharge of this duty is compatible with the adoption of a general policy in relation to a class of case. One qualification must be added: the policy of the justices must be reconcilable with the policy of the Act from which they derive their powers; it must not be an irrelevant consideration that they are impliedly precluded from taking into account. That these principles also govern the conduct of other types of licensing authorities is shown by the well-known judgment of Bankes L.J. in *R.* v. *P. L. A., ex p. Kynoch, Ltd.* [1919] 1 K.B. 176 at pp. 183–5.

The law laid down in the *Torquay Case* is firmly rooted in sound sense, for, as the Lord Chief Justice said in the course of argument (at p. 786): "Every bench of justices has some sort of policy with regard to licensing applications." Later, in delivering judgment, he observed (at p. 788) that "if the justices have decided upon a policy to guide them in considering applications it is only fair that they should make it public so that applicants may know what to expect." One may respectfully express agreement with this observation, which could well be brought to the attention of other licensing authorities whose decisions are not published in series of reports.

As is usual in the situation typified by the *Torquay Case*, the conduct of the justices was impugned only on the ground that they

had unlawfully fettered their discretion, and not on the ground that they had violated the rules of natural justice by exhibiting bias. It can be regarded as certain that had the allegation of bias been raised it would have received short shrift. Yet the justices could not be said to have acted with wholly open minds; the chairman of the justices had announced, some months before the applicant in the present proceedings had sought a full licence, that full licences would in future be granted only in very exceptional circumstances. Although the analogy is by no means complete, the situation resembled in some ways that which existed in the *Stevenage Case* [1948] A.C. 87. There the Minister had been placed by Parliament in a position where his attitude towards the confirmation of a new town designation order was bound to be coloured by his views on the right policy to pursue, and he had in fact made no secret of his views; nevertheless, the validity of his confirmation of the order was upheld, there being no evidence that he had not honestly considered the case for and against the order. The House of Lords held, moreover, that complaints of " bias " were irrelevant because the Minister's functions were purely " administrative." This convenient verbal device would not have been available to the court in the present case, for the functions of licensing justices are recognised as being partly judicial, and a decision will be quashed by certiorari if the personal interest or pronouncements of individual justices had given rise to a real likelihood that bias would be shown towards an applicant. Had the question of bias been raised the court might have drawn a distinction between the illegitimate " private bias " of individual justices and the often permissible " official bias " of the bench in regard to a particular class of application. It might have said that whilst the justices must not treat an individual application as a *chose jugée*, they are not obliged to act with the unblemished open-mindedness of the ideal judge, and that as members of an administrative tribunal concerned with the formulation and application of standards of policy it is enough in some cases for them to keep their minds ajar. This judgment will doubtless never be delivered; but if it were, how many of those critics who were scandalised by the *Stevenage Case* would be moved to protest?

S. A. DE SMITH.

THE DANGER OF JOHN DOE

" PROFESSIONAL licence, if carried too far, your chance of promotion is likely to mar," said the Lord Chancellor in *Iolanthe*. A cursory reading of *R.* v. *Weisz and Another, ex p. Hector MacDonald, Ltd.* [1951] 2 All E.R. 408 might suggest that the penalties were somewhat heavier. In that case there was an application on behalf of a firm of bookmakers to commit a solicitor and his client for contempt

of court. The solicitor had issued a writ claiming for his client a sum of money as being due upon an account stated. In fact the sum claimed represented an alleged gaming debt, a claim which had, incidentally, already been disallowed by Tattersalls. The attempt to commit for contempt followed some preliminary skirmishing. For his part the Lord Chief Justice had, in his evidence before the Royal Commission on Betting, said : " If ever another case of that description " [*scil.*: an action on a gaming debt disguised as an account stated] " comes before me, I intend to have steps taken so that the matter may be brought before the court and judgment given as to whether it is contempt or not. For myself I have no doubt that it is." As a commentary on that statement the Law Society published an opinion of the Council, stating that there was in the Council's view " no question of it being professionally improper " to accept instructions to sue for a gaming debt, and that the Council understood that the Lord Chief Justice's statement referred exclusively to the account stated device. (See *The Law Society's Gazette*, March, 1951, at p. 105.)

An opportunity to determine the issue came in the present case, and the Lord Chief Justice found the solicitor, but not the client, guilty of contempt, since it was the former who was responsible for issuing the writ in the form it took; the client had merely directed that proceedings should be taken. It should be noticed that the indorsement of the writ had been settled by counsel, but there was no application in respect of him. For various reasons, although the solicitor was found to be in contempt no penalties were imposed on this occasion. The nature of the contempt should be carefully observed. The Lord Chief Justice said (at p. 412): " It has never yet been held, however, that merely to bring, or cause to be brought, an action which is an abuse can be treated as contempt, even though it has been brought for the purpose of pressure, or what may be called ' showing up.' If it were held that to bring an action prohibited by the Gaming Acts was punishable, it would mean that the court was treating as criminal something for which Parliament had not provided a penalty. . . . It is necessary to emphasise that the contempt in the present case lies not in bringing an action forbidden by the Gaming Acts but in bringing it as a feigned issue so as to conceal its true nature from the courts." The difficulty is, however, to know what is a " feigned issue " concealing the true nature. In *MacDonald* v. *Green* [1951] 1 K.B. 594 the original gaming debt was owed to a bookmaking firm Hector Macdonald, Ltd., the action being brought as for a private loan by the managing director, the particulars of claim disclosing merely a loan and apparently making no mention of the gaming background [[1951] 1 K.B., at p. 596]. In *Coral* v. *Kleyman* [1951] 1 All E.R. 518 it does not seem from the report that the nature of the sum due was apparent on the face of the plaintiff's pleadings. Similarly, in *William Hill (Park Lane), Ltd.* v. *Hofman* [1950] 1 All E.R. 1013

the true nature and history of the transaction was apparently only revealed by the defendant's affidavit. Were the plaintiffs in these three cases in contempt, therefore, for concealing the true nature of the action? If so, the hazards of finding the precise meaning of the phrase " alleged to be won upon a wager " in section 18 of the Gaming Act, 1845, are greatly increased. Yet that is a legitimate quest, since there was no unanimity on that point even among the majority of the House of Lords in *Hill* v. *William Hill* [1949] 2 All E.R. 452. The difficulty is often that the " true nature " of the transaction may well not be known until the court has decided. No doubt the plaintiffs in each of the three cases above believed that they had circumvented the Gaming Acts and were therefore disclosing the true nature of the transaction. Such, however, was not the view of the courts. The issue is one of greater importance than the discussion of gaming cases suggests. Gamblers may well be left to face an extra hazard. The same issue arises, however, in illegal contracts. The borderline between minimising your tax liability (which is lawful) and illegally evading tax is at the same time, though in different senses, both fine and misty. *Napier* v. *National Business Agency, Ltd.* [1951] 2 All E.R. 264 points that moral. By omitting any reference to the history or purpose of the transaction in such cases would the plaintiff be concealing? He may well have honestly believed such matters to be irrelevant.

Too broad an interpretation of this head of contempt could raise a considerable obstacle to free access to the courts. The limitations emphasised by the Lord Chief Justice are therefore important. Moreover it would seem that his phrase " so as to conceal its true nature from the court " must be read in the sense of " with a deliberate intention to conceal and mislead " rather than " in such a way as in fact to conceal." The knowledge and intent of the plaintiff and of his legal advisers are therefore relevant and important. On that basis the present case goes no farther than such cases as *Coxe* v. *Phillips* (1736) Lee t. Hard. 237 (to which reference was made) or *Linwood* v. *Andrews and Moore* (1888) 58 L.T. 612, where the deliberate intent was manifest. If this interpretation be correct solicitors may, where the law is uncertain, still act freely on behalf of audacious clients without worrying unduly about the shadow of the Tipstaff. Nevertheless even on this narrow interpretation one wonders how it was that John Doe and Richard Roe did not spend the greater part of their fictitious lives purging their contempt, certainly they would have been unwelcome persons to attorneys, for whom the walls of a prison would have been as substantial as the dealings which they attributed to those famous spirits were feigned. Sir Henry Maine would no doubt count the change of attitude as a sign of grace and a mark of maturity in English law.

J. D. B. Mitchell.

Merchandise Marks Act—Intent to Defraud

By the Merchandise Marks Act, 1887, s. 2 (1), it is an offence to sell goods under a false trade description unless the seller proves that he had no intent to defraud. In *Kat* v. *Diment* [1951] 1 K.B. 34, the defendant sold bottles labelled " non-brewed vinegar "; this was the customary description of the contents in the trade, and there was no evidence that it bore any different meaning to the public. It was held that the description was not a true one, the article not being vinegar. The defendant was thereupon convicted.

The Merchandise Marks Act and the Food and Drugs Act, which were passed to secure commercial honesty, have too often been instruments for securing an assumed purity of language. The present decision looks like another example of the old " proper meaning " fallacy: the court refuses to admit that an adjective can remove the thing from the genus apparently indicated by the noun. Let no judge henceforward refer to his judicial ermine, or to an involuntary bailee, or a void contract, or a bigamous marriage, for such an expression is open to the same objection as that for which Mr. Kat was convicted.

The result of the decision is that a manufacturer who in perfect good faith has been making a wholesome and useful product known in the trade as non-brewed vinegar is suddenly told that he is a criminal for calling it that. What alternative name is he to give it? Apparently he must invent some odd-sounding trade name; but if there are several manufacturers in the field we may still be without a generic name for what they make.

The law is acquainted with a notion called prescription. In this case the product had been called vinegar ever since 1890—at first wood vinegar, then table vinegar, and latterly non-brewed vinegar. One would have thought that this was sufficient evidence of usage. Moreover, one knows that the vendors of malt vinegar are always careful to emphasise the word " malt." Apparently in *Kat* v. *Diment* the court regarded usage as having petrified for the purpose of the Merchandise Marks Act in 1887, but it is, with respect, difficult to believe that this was the intention of section 18 of the Act.

It is submitted that even if the product had been a recent invention, that fact should not in itself have disentitled it to be called vinegar. The questions for consideration are two. (1) Is the product intended to serve and does it serve the same or substantially the same purpose as the established product? (It was found that non-brewed vinegar served the same purpose as malt vinegar.) (2) Has it any disadvantages not possessed by the established product? (It was found that non-brewed vinegar was wholesome.) If these questions are answered favourably to the substitute product, and if it is given a suitable distinguishing adjective (what word would put any housewife on inquiry better than " non-brewed "?), there

would seem to be no reason for not allowing it to take the generic name of the established product. The manufacturers of the latter will still be able to emphasise that they make the genuine, original article, and to warn the public against substitutes. If the public, on grounds of price or otherwise, prefers the substitute, it is surely entitled to the preference.

Another surprising feature of the case is the rejection of the defendant's defence that he had no intent to defraud. Lord Goddard C.J. said that under the statute the accused could escape if he showed that he did not do the act intentionally, but here he had sold the bottles intentionally. With respect, this seems to be a misreading of the statute. What the statute says is that the accused can escape if he shows that he did not intend to defraud, and one can intentionally sell bottles which are in fact mislabelled without intending to defraud.

It is a defence to a charge under the next subsection of the Act, section 2 (2), to show that the accused acted innocently. Lord Goddard said that there was no difference between acting without intent to defraud under subsection (1) and acting innocently within subsection (2), and he therefore relied on authorities under subsection (2) in order to reject the defence under subsection (1). But if there is no difference, why did Parliament use different expressions? A person who acts negligently is held not to act innocently (*Wood* v. *Burgess* (1889) 24 Q.B.D. 162; *Allard* v. *Selfridge & Co.* [1925] 1 K.B. 129); but it is accepted legal principle that a person who honestly (though negligently) believes in the truth of his statement does not intend to deceive, and therefore does not intend to defraud. In *Brend* v. *Wood* (1946) 175 L.T. 396, Lord Goddard held that on a charge of possessing a forged document "with intent to deceive," where the accused was found in possession of a forged petrol coupon which he had received from someone else without knowing that it was forged, the offence was not made out.

Slatcher v. *George Mence Smith, Ltd.* [1951] 2 All E.R. 388 is a decision on section 2 (2) of the Act. It was held that the defendant did not act innocently if he acted innocently but his servant acted wrongly. A mere statement of this decision seems to be sufficient to show that something must have gone wrong with the reasoning. It is opposed to the earlier case of *Thompson* v. *Howard* (1944) 108 J.P. 246, which does not appear to have been cited.

Glanville Williams.

"Found" in Criminal Law

The word "found" is of considerable importance in criminal law, because many statutes authorise the arrest without warrant of persons "found" in certain situations, or make it a special offence

to be so " found." We now have a fresh ruling upon the meaning of this word : it appears from *R.* v. *Lumsden* [1951] 1 All E.R. 1101 that to be " found " in a building the accused must have been seen in it; it is not enough that he is seen emerging from the door. *Thomas* v. *Powell* (1893) 57 J.P. 329 (which is noted in Burrows' *Words and Phrases*) was not cited to the court : in that case an opposite conclusion was reached on the interpretation of the word in the Licensing Acts.

According to American authorities, a person may be " found " otherwise than through the sense of sight. Hence it has been decided that a person may be " found " committing an offence or may commit it " in the presence of " an officer if the officer is apprised of it through the sense of hearing or smell: see *Dilger* v. *Commonwealth* (1889) 88 Ky. 550, 11 S.W. 651, and other cases in Dession, *Cases on Criminal Law and Procedure*, 293–4. A taking on fresh pursuit is in law a taking at the time at which and the place from which the pursuit started ((1939) 20 British Year Book of International Law, 86–7). Where a statute empowers the arrest of a person found committing an offence, it seems that an arrest is lawful if the culprit is " found " by a private person, who summons a constable, who in turn arrests on fresh pursuit in the absence of the person who found the culprit : see *Stevenson* v. *Aubrook* [1941] 2 All E.R. 476. In any event it would be lawful for the constable to assist the finder to effect the arrest : see Warner in (1943) 21 Can.Bar Rev. at 203. A person cannot be " found committing " an offence that in its nature is not visible, such as failing to support his wife: *Horley* v. *Rogers* (1860) 2 E. & E. 674. See generally 14 Eng. & Emp. Dig. 185–6. These difficulties suggest a doubt as to the policy of limiting the power of arrest by words like " found " or " presence." The important question for Parliament to consider in giving a power of summary arrest is whether the offender is likely to escape if not immediately arrested, and the question whether the offence was committed in the view or vicinity of the arrestor is of no relevance to this.

GLANVILLE WILLIAMS.

STANLEY *v.* POWELL IN THE COURT OF APPEAL

IT is not often that a general problem of liability in tort comes before the Court of Appeal, and when the problem is whether inevitable accident constitutes a defence to trespass, the case may be expected to arouse considerable interest. Yet those who turn to *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd., and Another* [1951] 2 All E.R. 310 hoping to find new light being shed upon this matter are destined for disappointment, for there is nothing fresh in these judgments (which were not reserved), and a good deal that is open to criticism. Much important material

appears to have been overlooked, while that which has been investigated has only been cursorily surveyed.

The case was an appeal from a decision of Donovan J. whereby he held the defendants liable for trespass to an electric cable, the property of the National Coal Board, which was sunk under land belonging to the Glamorgan County Council. The Council engaged the first defendants as contractors to erect new workshops at the School of Mines, Treforest, Pontypridd. The work to be done included the cutting of a trench for drainage purposes across land occupied by the School of Mines. The second defendants were employed as sub-contractors for the purpose of excavating this trench. A plan supplied to the contractors by the County Council showed the line of the required trench, but there was nothing to show that under the land athwart the line of the proposed trench there was an underground cable belonging to the National Coal Board, which carried electricity at high voltage from one colliery to another. This cable had been laid by the colliery people without the knowledge or permission of the County Council, and it went underground at a pylon quite near the site of the proposed trench, and re-emerged some four hundred yards away at another pylon. If the cable had run in a straight line between the two pylons, it would have been nowhere near the proposed trench, but instead it pursued an erratic course which brought it across the line of the trench. A mechanical excavator, operated by the second defendants, in the course of excavating the trench to the required depth, struck and broke the concrete cover of the cable and hit the cable itself. This damage was reported to the clerk of works of the County Council and the manager of the sub-contractors, but no steps were taken to notify the owners of the cable. Instead, the work continued without interruption, the drain was laid in the trench, and it was duly filled in. This was in the autumn of 1948. In May, 1949, the electricity supply carried by the cable failed, and it was discovered that water seeping through the damaged part of the cable had come into contact with the live wires and caused an explosion.

The Coal Board brought this action against the defendants claiming damages for trespass and negligence. Donovan J. held that there was no negligence, for the contractors were entitled to assume that there was nothing under the ground in the path of the proposed trench. It was argued that because of the proximity of the pylon they should have suspected the presence of the cable, but the learned judge held that they were not negligent in this respect. The pleadings did raise the point that there was negligence in not notifying the Coal Board when the excavator hit the cable, but this point was not pursued at the trial, and on the appeal it was held that it was not open for argument. In any case, as Cohen L.J. pointed out in the Court of Appeal, if there was such negligence, it was the negligence of the Council, not of the

contractors, for the latter did their duty by reporting the matter to the Council's clerk of works. Having dismissed the claim on the head of negligence, Donovan J. went on to hold the defendants liable in trespass. He considered that the defence of inevitable accident did not apply in this case, because the defendants intended to cut the trench where it was in fact cut, and the damage ensued not through some act over which they lacked all control, but simply because they did not appreciate what lay in the path of the proposed trench. This savours of the view held by Beven that loss of control would absolve a defendant from liability, but not if he had freely engaged in the activity in the course of which control was lost (see *Beven on Negligence*, 4th ed., Vol. I, p. 710). Mr. Gold, writing at some length in 21 Bell Yard p. 5 *et seq.*, has developed an even wider " control " theory, and the late Dr. Stallybrass appears to have subscribed to this view (see *Salmond's Law of Torts*, 10th ed., p. 24).

In the Court of Appeal, the trial judge's view that there was liability in trespass did not meet with approval, and the appeal was allowed, Cohen L.J. delivering the principal judgment, supported by Singleton and Morris L.JJ. Only four cases appear to have been discussed, and unfortunately it cannot be said that the treatment of any one of them is really satisfactory. The Master of the Rolls has recently explained how difficult it is for the Court of Appeal to devote adequate time to the consideration of the cases before that court, because of the " constant and exacting pressure " of business (see his published lecture on *The Court of Appeal in England*, 1950, Athlone Press). He admits that they do not reserve as many judgments as perhaps they should. It is suggested that the present case is one which has suffered as a result of this situation. Surely the Court of Appeal could have conducted a more adequate investigation of the relevant case law, even though they may not have wished to say anything fresh about the principle of the matter.

The first case considered was *Weaver* v. *Ward* (1616) Hob. 134, where a soldier who accidentally wounded another in musket practice was held liable in damages, and the report says that " no man shall be excused of a trespass . . . except it may be judged utterly without his fault." Denman J., in *Stanley* v. *Powell* [1891] 1 Q.B. 86 at p. 89, regarded this statement as a " summing up of the law applicable to cases of unintentional injury by acts which are prima facie trespasses," and in the present case the Court of Appeal were inclined to take the same view. They took the case to indicate, not that there is strict liability in trespass, which is what the plaintiffs contended, but that " where the defendant was entirely without fault, he would have a good defence to an action in trespass "—*per* Cohen L.J. at p. 314. Morris L.J. actually applied one of the illustrations of situations exempting a defendant from liability, given in *Weaver* v. *Ward*, to the facts of

the present case, notwithstanding that in *Dickenson* v. *Watson* (1682) T. Jones 205 facts similar to those in the illustration came before the court and the decision was in favour of liability. It seems of little avail that Sir Frederick Pollock should have pointed out that in *Weaver* v. *Ward* " the defendant's plea was held bad because it only denied intention, and did not properly bring before the Court the question whether the accident was inevitable " (*Pollock on Torts*, 14th ed., p. 112) or that Mr. Gold should have demonstrated that " the decision itself does not support the view that the defence (of accident) is tenable " (*loc. cit.* p. 16). The Court of Appeal is willing to use the dicta in this case to found a proposition despite the fact that it has been said that they " are too confusing to permit of their confident citation for any contention with respect to inevitable accident " (*ibid.* p. 17).

The second case was that of *Leame* v. *Bray* (1803) 3 East 593, where a statement made by Grose J. at p. 600 has been thought to imply that if the injury be done by the act of the defendant he is answerable in trespass even though it happens accidentally or by misfortune (*cf.* the " control " theory). It was argued that this applied in the present case, but this contention was very briefly swept aside by Cohen L.J. He pointed out that most of the early cases had been decided on points of procedure, and contained dicta which do not, if read literally, appear to have been approved or followed in any modern case. (This can no longer be said of the dicta in *Weaver* v. *Ward*.) In thus rejecting the argument based on *Leame* v. *Bray*, Cohen L.J. might have stated more specifically that what Grose J. said was really obiter because the case concerned the choice of the proper form of action (see Pollock, *op. cit.* p. 113, Gold, *loc. cit.* pp. 20, 21).

Next comes *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261, the case where the defendant's horses ran away and knocked down the plaintiff in the highway, and it was held that there was no liability. There is some doubt as to whether Bramwell B. in this case, at p. 267, meant to limit the effect of his decision to accidents occurring on the highway. Pollock believed that he did (*op. cit.* p. 114), and he quoted in support of this view the judgments of the Exchequer Chamber in *Rylands* v. *Fletcher* (1886) L.R. 1 Ex. 265, at pp. 286, 287. See also Landon's references to Bramwell's judgment in the Court of Exchequer in the same case indicating that trespass is actionable whatever the defendant's state of mind (Landon in *Pollock on Torts*, 14th ed., p. 142). Although this view was urged before the Court of Appeal, Cohen L.J. could see " no logical reason for placing such a limit on the general observations of Bramwell B." and refused to accede to the argument, although he was careful to indicate that it was " not necessary to express a final conclusion on this point." He instanced in support of his view Denman J.'s use of the Bramwell quotation in *Stanley* v. *Powell*, which was not a case of accident on the highway. There is another controversial

passage in the judgment of Bramwell B., at pp. 268, 269, in which he dismissed most of the previous cases as irrelevant because they turned on the choice of the appropriate form of action, and in which he is said to have implied that accident is a good defence to trespass. Mr. Gold has argued that the learned Baron's interpretation of the previous case law is incorrect (*loc. cit.* p. 23), and Mr. Landon has contended that this passage is more accurately reported in *The Law Times Reports* and does not imply that accident is a defence in trespass (*op. cit.* p. 143). Nevertheless the Court of Appeal appears to accept without question *The Law Reports* version of Bramwell's remarks and the interpretation of the previous case law therein expressed, and uses the passage to support the view that accident is a defence in trespass.

Stanley v. *Powell* [1891] 1 Q.B. 86 is the last of the four cases to be considered. Notwithstanding the penetrating and trenchant criticism of the judgment of Denman J. which has been voiced by Messrs. Beven, Landon and Gold, and the doubts of others, this judgment is referred to with approval, respect and even admiration in the Court of Appeal, and its conclusions are accepted. There is no discussion of the case at any length. While it is not suggested that the result ought to have been different, it seems a pity that more time could not have been devoted to a careful review of the whole position before adding the weight of the Appeal Court's approval to what Mr. Landon has described (and can no longer describe) as "the sole decision supporting a departure from the fundamental Common Law doctrine."

Finally, the decision in *N. C. B.* v. *Evans* contains certain general remarks about the merits of the plaintiffs' case as against that of the defendants, and the absence of any fault on the part of the latter. These statements might be regarded as lending support to the view that there is no liability in tort without fault, so strongly advocated by Salmond, were it not for the fact that they may be attributed more correctly to the desire of the Court of Appeal to invoke the statement in *Weaver* v. *Ward* to the effect that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault" and to apply it to the facts of the present case. The fault in this case lay in the first place with the colliery people, who laid the cable in a trespassory manner, and in the second place with the County Council, which failed to inform the Coal Board of the accident to the cable in the autumn of 1948. The N. C. B. could not have sued the Council since they were themselves in the position of trespassers with regard to the cable. *Ex turpi causa oritur non actio.* The case against the contractors would have been more satisfactorily disposed of could they have been regarded as standing in the same shoes as the County Council with regard to the availability of this defence. That the Court of Appeal was conscious of this aspect of the matter is evident from statements made by Morris and Cohen L.JJ. We

might then have been saved the rather unprofitable excursion into the realms of negligence and trespass upon which the two courts embarked.

J. E. Hall Williams.

The Nature of Trespass

In contrast to the decision in *N. C. B.* v. *Evans* (noted above) the following dictum of Asquith L.J. (as he then was) in *Conway* v. *George Wimpey* [1951] 2 K.B. 266 may be quoted: "It is elementary that if A, professedly acting on behalf of B, purports to give me leave to enter on B's land, and A has no actual authority to do so, I am a trespasser if I act on this permission: none the less so, because I do not know of A's want of authority" (at p. 274). Yet it is clear that the entrant is "utterly without fault."

The apparent conflict can, however, be resolved by examining the issues involved in these cases. In *Conway* v. *George Wimpey* the question was whether the employers of a van driver were liable to a stranger who had been injured, while on the van, by the driver's negligence. The driver had been expressly ordered not to give lifts to unauthorised persons, but the plaintiff was not aware of this fact. It was held that the defendants were not liable: they owed no duty to the plaintiff as he was a trespasser on the vehicle. The distinction between the two cases would seem to be this. In *N. C. B.* v. *Evans* it was held that the plaintiff had to show fault in the defendant. In *Conway* v. *George Wimpey* the plaintiff had to show that the defendants owed him a duty of care. This he could do by showing that he was a licensee. He could not establish such a duty by merely showing that he *thought* he was a licensee. Once it was held that he was not in fact a licensee, it really became unnecessary to hold that he was a trespasser. He was merely so classified because of the somewhat artificial nature of the categories into which the law divides entrants on other people's premises. After *N. C. B.* v. *Evans* it by no means follows that he was guilty of an actionable tort.

Although these two decisions are thus perfectly reconcilable, the wider problem—whether an innocent person can be a trespasser—remains. It is sometimes suggested that the answer to this problem depends on the type of trespass complained of. But after the approval of *Stanley* v. *Powell* [1891] 1 Q.B. 86 in *N. C. B.* v. *Evans* any distinction in this context between trespass to goods and trespass to the person is manifestly untenable. Nor, it is submitted, does trespass to land stand on a different footing. There seems to be no merit in the view that *Stanley* v. *Powell* would have been differently decided if the pellets from the defendant's gun had shattered the window-panes of a greenhouse.

It is submitted that the vital distinction is not in the kind of

trespass complained of but in the purpose for which the complaint is made. Trespass has two distinct aspects—a tortious aspect and a proprietary aspect. This is due to the well-known fact that English law has no purely proprietary action, and that trespass has been adapted to fill this gap in the law. The action of trespass now provides redress both for injury to person and belongings and also for interference with possession and hence with title. When trespass is considered in its tortious aspect, it is now clear that (subject to certain exceptions such as cattle trespass) fault is an essential element of liablity. When trespass is considered in its proprietary aspect, fault is immaterial. This is clearly essential for the protection of title to land. Equally, since conversion cannot be committed without denial of title, and since it is a defence to detinue that the defendant has lost the chattel without any default on his part, the action of trespass may still in certain cases be essential to ensure that the innocent act of A should not deprive B of his title to a chattel.

G. H. Treitel.

Traditionalism Ascendant

The decision of the House of Lords in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* [1951] 2 All E.R. 617, reversing the judgment of the Court of Appeal, is one in which the dicta have a more permanent interest and importance than the *ratio decidendi*. The *ratio* turned on a simple point of construction.

Briefly, the facts were that, in 1941, the plaintiff film distributors agreed to supply news reels to the exhibitor defendants in an agreement expressly determinable by four weeks' notice on either side. In 1943, the decline in raw film stock necessitated the promulgation of the Cinematograph Film (Control) Order, under the Emergency Powers (Defence) Act, 1939, which had as its relevant purpose the maintenance of supplies and services essential to the " life " of the community. As a result of the order, the parties, in 1943, concluded a supplemental agreement, two parts in which proved ultimately vital in their litigation: namely, the recital, " Whereas by the Cinematograph Film (Control) Order, 1943, it has become necessary to restrict the consumption of raw film stock," and the clause, " The principal agreement shall remain in full force and effect until such time as the said Order is cancelled." After the war, the life of the 1943 Order was extended under the Supplies and Services (Transitional Powers) Act, 1945, which had as its relevant purpose the securing of supplies and services essential to the " wellbeing " of the community. Some time before the final revocation of the Order, the exhibitors sought to terminate the agreement by giving four weeks' notice. The distributors retaliated with an action for damages alleging breach of contract on the ground that withdrawal

by either side was expressly precluded so long as the 1943 Order endured.

The Court of Appeal held that the duration of the Order within the meaning of the contract depended on the relevant purpose of the 1939 parent Act, that is, the maintenance of raw film stock to preserve the " life " of the community; that the exhibitors entered into the supplemental agreement and submitted to war-time uniformity of news reels and a cessation of the normal business practice of competitive buying as part of the war effort; that as reasonable businessmen they contemplated the duration of the war emergency as the duration of the Order for the purpose of their contract; or, in other words, in 1943 businessmen contemplated peace bringing not a planned economy but business as usual. Hence, on the termination of the war purposes, the contract became terminable by four weeks' notice.

The House of Lords, on the other hand, considered that the duration of the Order for the purposes of the contract was governed by the recital, which the Court of Appeal had entirely ignored in its interpretation. As the parties had taken the trouble to specify the cause of their supplemental agreement in the narrow terms of the 1943 Order, they must be taken to have intended the supplemental agreement to bind without escape until it was no longer necessary to restrict the consumption of raw film stock. Hence, the distributors were entitled to their damages.

The dicta in the House referred to two important issues: the theoretical basis of the doctrine of frustration, and the nature of the judicial process involved in the interpretation of contractual terms ambiguous in themselves or by reason of circumstance.

The immense virtue of Denning L.J.'s judgment in the Court of Appeal lay in its explicit articulation of the movement of judicial discretion and policy in cases of frustration or contractual construction. Thus, with regard to the doctrine of frustration, Denning L.J. joined the small though distinguished division of the Judicial Committee of the Privy Council in *Hirgi Mulji* v. *Cheong Yue S.S. Co.* [1926] A.C. 509, 510, and Lord Wright in *Denny Scott & Dickson, Ltd.* v. *Frazer, Ltd.* [1944] 1 All E.R. 683, in asserting that, in such cases, " the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation " ([1950] 2 All E.R. 395). The House of Lords, on the other hand, approved of the traditional implied term theory, which must now therefore be considered as having been stabilised, at least for the time being. Provided the courts continue, as they have done in the past, to ignore this " spurious fiction " in the actual application of the doctrine of frustration, no practical consequence will arise from cleaving to the traditional view, other perhaps than some hazing of clarity of thought. It may, however, be worth reiterating what others have so cogently put that a danger does arise if some future

bench were to take the fiction seriously. At such time, cases like *Tatem* v. *Gamboa* [1939] 1 K.B. 132, and *Constantine S.S., Ltd.* v. *Imperial Smelting Corp.* [1942] A.C. 154, will go the other way, adversely to the business considerations involved.

Again, in the matter of the interpretation of contracts in the light of particular circumstances, the House preferred, it seems, to regard the judicial process involved simply as a search for some objective " true," " just " or " proper " construction, or for the " presumed " common intention of the parties, or for some " necessary " implication from the circumstances. Denning L.J., on the other hand, frankly declared this process to take place within the area of judicial discretion and policy. It may be emphasised that the judicial discussion of policy and discretion does not increase the uncertainty of case law. By granting lawyers additional, vital information, it in fact increases the predictability of decisions, which lies at the root of certainty in case law. Not only for this reason but also for future legal development, it were a great pity if the area of judicial discretion and policy be kept in a condition of guarded secrecy, as though it were a mental Harwell. Beyond this consideration, however, judicial silence concerning the exercise of discretion and policy-motives does not matter a practical jot provided the judge appreciates the real task involved in the circumstantial interpretation of contracts, or has, in any case, a strong intuitive sense of justice. The danger arises only where a contract comes before a strict constructionist, who may produce an unjust result through sheer pedantry.

The validity of a strict doctrine of precedent such as we have, formally, at least, in this country today seems to me to rest substantially on the assumption that Parliament is always at hand to untie the knots to which logic, logical analogy and ageing conceptions may lead. In fact, at present, Parliament has not the time to perform such operations, at least for the details of substantive law, and there exists no other agency of continuous adjustment, like the Ministry of Justice most recently advocated in the publication, edited by Prof. Glanville Williams, *The Reform of the Law*. While the present position persists, it seems essential for some relaxation of *stare decisis* to be allowed in cases where the law does or may do manifest individual injustice, for the judiciary to regard the judicial function as larger and more creative than the mere use of the analogue alone and to avoid an attitude of opposition towards the needed reorientation of fundamental conceptions. It is because the House of Lords appears, on the surface at least, to have adhered to such an attitude and to the narrower view of the judicial function that the dicta expressed in the *British Movietonews Case* give cause for concern.

C. GRUNFELD.

Capacity to Marry in the Conflict of Laws

What is the relation of the Conflict of Laws to statute law? Does the statutory character of a law interfere with the normal functioning of the Conflict of Laws? Modern Conflicts of Laws prescribe whether the *lex fori* or a legal system foreign to the forum should be applied. The application of a rule of domestic law depends, therefore, upon prior consultation of the Conflict of Laws. If each rule of domestic law were itself to control its application by specific directions attached to it there would be no room left for any Conflict of Laws as an independent branch of law. To some this may appear a not uninviting prospect, yet it needs little reflection to understand that the Conflict of Laws, whatever its imperfections, offers the best means of consistent and orderly administration of justice, and there seems general agreement that this branch of law is a valuable, and indeed indispensable, part of any civilised modern legal system. There are, on the other hand, a growing number of statutory rules which themselves control their application in space.

As far as English law is concerned these enactments have been examined by Dr. Morris, who has shown that they have been as unsuccessful in practice as they are confusing in theory.[1] These parasitic legislative phenomena (Dr. Morris calls them "bastard hybrids") are fortunately few and it is to be hoped that their number will not be increased. The threat to the English Conflict of Laws constituted by them is as yet insignificant. But there is a great danger that the Conflict of Laws in this country will be almost completely swamped if all English statutes are considered as containing impliedly, if not expressly, *ad hoc* directions as to their area of operation. The measure of this danger is given by the inevitably growing proportion of statute law in the body of English Law as a whole.

It is therefore of vital importance that in the absence of express directions the application of English statutes should be derived from the Conflict of Laws and not from any *ad hoc* directions which are supposed to be implied in the statute itself. A decision reached by this faulty method may be the same as would follow from consultation of the Conflict of Laws. It is nevertheless of more than academic importance to reach a right decision by the correct method, and not by reasoning which at best shows little progress from the doctrine of the statutists and which at worst might undermine the whole fabric of the Conflict of Laws.

This is precisely what happened in the recent decision of Mr. Justice Pearce in *Pugh* v. *Pugh*.[2] The simple facts of this case were that a marriage had been concluded in Austria between a domiciled Englishman and a domiciled Hungarian girl, 15 years of

[1] "The Choice of Law Clause in Statutes" in 62 L.Q.R. 170.
[2] [1951] 2 All E.R. 680.

age. It was necessary to decide whether the validity of this marriage should be determined by Austrian or Hungarian Law, under which the marriage was, or had become, valid, or by the relevant provisions of English Law, namely, the Age of Marriage Act, 1929, s. 1 (1).[3] Instead of justifying the application of the Age of Marriage Act to the facts of this case by the well-established rule of English Conflict of Laws that capacity to marry is governed by the laws of the domicile of the parties, Mr. Justice Pearce reached this conclusion in the first place by "interpretation of the statute itself," so as to discover whether Parliament in enacting this statute could be taken to have intended that it should operate only territorially, or so as to affect capacity to marry "in all persons domiciled in the United Kingdom wherever the marriage might be celebrated."

The Conflict of Laws was then consulted and the conclusion reached in the first place as a matter of statutory interpretation was confirmed as in accord with the rules of Conflict of Laws. The Age of Marriage Act has been examined in relation to the Conflict of Laws by two authors, Sir Eric Beckett, whose article [4] alone was considered by Mr. Justice Pearce, and by Dr. Morris.[5] Both authors agree that this Act is one which, as distinct from such Acts as the Inheritance (Family Provision) Act, 1938, does not contain any *ad hoc* directions as to its area of operation. Sir Eric Beckett suspected that this matter had been overlooked when the Act was drafted. Dr. Morris says that the Age of Marriage Act is "a typical example of a statute without any choice of law clause," and, later on, that "we may be thankful that the draftsman of the Age of Marriage Act, 1929, did not plunge into these troubled waters." Unfortunately, the plunge was taken in the present case in order to find a solution readily available without this dangerous exercise. The admission of Mr. Justice Pearce that if he had remained in doubt as to the intention of the statute he would have been compelled to uphold the marriage, presumably, by applying the presumption in favour of marriage, demonstrates the risk of remaining submerged in the troubled waters of statutory interpretation. It is true that in the event the absurdity of upholding this marriage on the strength of a presumption in the teeth of the Conflict of Laws was avoided. This was done by attributing to the legislator an intention which he had not expressed because, probably, he had not formed it.

The filling of such gaps in the law is a familiar, though difficult, operation. It certainly should not be undertaken unless it is necessary. The silence of statutes on the question of their application in space does not create a gap in the law as long as there is the Conflict of Laws ready to provide the answer.

J. UNGER.

[3] Now: the Marriage Act, 1949, s. 2
[4] 15 B.Y.B.I.L. 46, at p. 64.
[5] *Supra.*

In the decision in *Pugh* v. *Pugh* noted above, Pearce J. granted the wife's petition for nullity on two grounds, namely :—

1. that the provisions of the Age of Marriage Act, 1929, applied to the husband as a British subject with an English domicile, wherever he might marry, since the effect of that Act is extra-territorial and not confined to marriages in the United Kingdom; and

2. that the validity of the marriage must be tested by the law of the country of the husband's domicile, or alternatively by the law of the country of the proposed matrimonial home.

The first ground, which was plainly dominant, is a decision on the operation of the Act itself, which has already been commented upon. The second ground rests, however, on the application of a common law principle in the Conflict of Laws. The precedents followed throughout were those dealing with marriages within the prohibited degrees, which under the Marriage Act, 1835, were made absolutely void instead of, as previously, voidable only by sentence of the ecclesiastical court, pronounced during the lifetime of both the parties to the marriage. Thus all these cases were concerned with matters governed by a statute, and while many of the previous decisions were based on both grounds the reasoning in respect of each ground is not always easy to disentangle. But between these cases and *Pugh* v. *Pugh* there is an important difference : cases of prohibited degrees involve a pre-existing relationship between the parties of consanguinity or, more usually (since most of the cases concerned marriage with the surviving spouse of a deceased sister or brother), of affinity, whereas in *Pugh* v. *Pugh* the incapacity was peculiar to one party to the marriage alone. In the classic case of *Brook* v. *Brook*,[1] Cresswell J.[2] held that the marriage in Denmark of a domiciled Englishman and his deceased wife's sister would have been voidable on grounds of nationality and domicile before the Act of 1835 and that by force of the Act it was rendered void. But he also held[3] that the Act of 1835 attaches upon the persons of British subjects and accompanies them to all parts of the world. Stuart V.C.[4] relied mainly on the construction of the statute, though he gave[5] three grounds for the decision, namely : (1) that the public policy of England prohibits the contract, (2) that the law is personal in its nature and must accompany the persons wherever they go, and (3) that England was the country with a view to which, and in which, the marriage contract was to have its permanent effect. In the House of Lords, whilst Lord Cranworth and Lord St. Leonards based their decision on the statute as affecting the capacity to marry of English subjects

[1] (1858) 3 Sm. & G. 481; (1861) 9 H.L.Cas. 193.
[2] (1858) 3 Sm. & G. 514.
[3] At p. 522.
[4] At p. 525.
[5] At p. 532.

domiciled in England, Lord Campbell and Lord Wensleydale relied on the common law ground of domicile in England. Lord Campbell also said that the matrimonial residence was contemplated in England and both of their Lordships expressly gave it as their opinion that the Act of 1835 did not bind all English subjects wherever they might be; Lord Cranworth joined them in saying that the Act of 1835 did not affect any marriages which would not have been impeached by the previous common law rule.

In one respect the present decision that the Act of 1929 has extraterritorial operation is narrower than the decision on the basis of domicile, since on the latter ground the capacity to marry of any foreigner (including a non-Christian) who is domiciled in England would appear to be restricted as far as the age of either party is concerned. In the older cases such as *Brook* v. *Brook*,[1] there is still considerable confusion between the ideas of nationality and domicile, which were first clearly isolated in 1869.[6] Moreover, it would seem that the first submission made on behalf of the wife and accepted in *Pugh* v. *Pugh* gives that Act a wider operation than was accorded to the Marriage Act, 1835, in the decisions on prohibited degrees. Thus in *Brook* v. *Brook*[1] all the judges who decided the case on the grounds of the extraterritorial effect of the Act of 1835 restricted its operation to the persons of English subjects (with or without domicile in England); and in *Mette* v. *Mette*[7] this was extended to persons naturalised in England. But in *Pugh* v. *Pugh* the first submission on behalf of the wife was that the Act applied to the husband as a British subject with an English domicile. Since the Nationality Act, 1948, the concept of a British subject has become a derivative concept, which embraces citizens of the Dominions, including India, Pakistan and Ceylon; *a fortiori* it includes also non-Christian subjects of the United Kingdom and Colonies. The effect is to extend the operation of the 1929 Act to all such non-Christian persons who are domiciled in England, although by section 3 (2) of the Act itself it does not extend to Northern Ireland.

Moreover, Pearce J. in his judgment expressly adverted to the decision in *Mette* v. *Mette*[7] that the disability of either party to the marriage would invalidate it, and he quoted also the case of *Re Paine*[8] in which it was held that a woman domiciled in England had no capacity to marry in Germany the former husband of her deceased sister who was a German subject domiciled in Germany. The learned judge thus appears not to have intended to confine his decision to the domicile of the husband or of the intended matrimonial home as affecting the capacity to marry of both parties, but to have intended it to apply to invalidate the marriage where the domicile of either party affects capacity, as

[6] *Udny* v. *Udny*, 1 Sc. & Div. 441, 457.
[7] (1859) 1 Sw. & Tr. 416.
[8] [1940] Ch. 46.

where a woman who is a British subject with an English domicile marries anywhere and either party to the marriage is under 16. Thus if, for example, an Indian acquires an English domicile, and his daughter, whilst under the age of 16, and therefore having a domicile of dependence in England, returns to India to be married there, it would seem that the marriage is invalid in English law.

It is perhaps also worthy of note that, because of the extra-territorial effect given to the Acts of 1835 and 1929, the law governing the capacity to marry particular persons now differs substantially from the law relating to capacity to contract a particular kind of marriage. Thus it is now established, on the narrowest construction of the present decision, that an Englishman domiciled in England cannot anywhere marry a woman under 16; it seems also that an Englishwoman domiciled in England cannot anywhere marry a man under 16. But it has only recently been held [9] that if an Englishwoman domiciled in England contracts a polygamous marriage in Egypt, the English courts will refuse to declare the marriage invalid. If either party had been under 16 at the date of the marriage, would the court have assumed jurisdiction?

O. M. Stone.

Monogamous Marriage—Mohammedan Divorce

In *Maher* v. *Maher* [1951] 2 All E.R. 37, a Mohammedan, domiciled in Egypt, married a woman professing Christianity, domiciled in England, at an English registry office. The Mohammedan then returned to Egypt where, appearing with two witnesses before the Cairo Court of Personal Status, he declared that he had divorced his wife in the presence of the same two witnesses by saying: "My wife, Kathleen Mary Collet, is divorced from me by three divorces." He was thereupon given a document reciting these matters. The wife subsequently petitioned successfully for divorce in England on the ground of desertion, founding the jurisdiction of the court under the three years' residence clause of the Matrimonial Causes Act, 1950 (s. 18 (1) (*b*)). If the Egyptian divorce, which was certainly valid in Egypt, was entitled to be recognised in this country, the wife's petition would have failed *in limine*. To succeed she would have to overcome, in the words of Barnard J. who heard the case, "the established rule of English law that domicil is the true test of divorce jurisdiction," and the fact that "the courts of England will recognise as valid any divorce which is granted by the courts of the country where the parties are domiciled, even on a ground which is not a ground for a divorce in England."

The petitioner advanced three arguments to attack the Cairo

[9] *Risk* v. *Risk* [1951] P. 50.

decree: (1) that it was contrary to natural justice because she had no notice of the proceedings; (2) that the divorce was not effected by a court of law, a necessary requirement for its recognition in England; (3) that in any event a "Christian" marriage in the *Hyde* v. *Hyde* sense (1866) L.R. 1 P. & D. 130 could not be dissolved by a method appropriate to a polygamous union. In support of the first argument, the petitioner cited *Rudd* v. *Rudd* [1924] P. 72, and *Shaw* v. *Att.-Gen.* (1870) L.R. 2 P. & D. 156. Barnard J. thought that in both these cases the English court had acted not so much on the ground of want of notice as on the absence of jurisdiction in the foreign court to make the decree in question. The learned judge concluded, without in fact deciding the case before him on this point, that the question of service is a matter for the court which hears the case, provided that it has jurisdiction. It is not without interest to note that the Scottish courts have taken a different view of *Rudd* v. *Rudd*: see *Scott* v. *Scott* 1937 S.L.T. 632, following *Crabtree* v. *Crabtree* 1929 S.L.T. 675 and *Rudd* v. *Rudd*, where a foreign judgment was said to be opposed to natural justice "not only where, as here, the foreign court had not competent jurisdiction, but also where there has been, as here, ignorance of the dependence of the suit and a want of notice to the party affected by the foreign judgment. . . . It is well settled that either 'want of jurisdiction' or 'want of due notice' is by itself sufficient to establish the condition of being contrary to natural justice." And, with respect, to the same effect would seem to be *Shaw* v. *Att.-Gen.* at p. 162 (last sentence but one). See also *Colliss* v. *Hector* (1875) 19 Eq. 334; Falconbridge, *Conflict of Laws*, p. 666, referring to the Ontario cases *Delaporte* v. *Delaporte* [1927] 4 D.L.R. 933 and *Bavin* v. *Bavin* [1939] 3 D.L.R. 328, where the question of judgment obtained by fraud is intermingled. Barnard J. was contemplating substituted service when he expressed his view, not the case where, as in *Maher* v. *Maher*, there was no service at all: *cf. Dobson* v. *Festi* [1891] 2 Q.B. 92 at p. 95: "It would be monstrous to allow a plaintiff, after serving only one member of a foreign firm, to obtain by default a judgment which would bind all the partners. They might be resident in other parts of the world, and have no opportunity of defending themselves." A case of no service at all would seem to be equally "monstrous"; an English court should have certain minimum standards of procedure which it insists shall be recognised if a foreign decree is to be recognised in England, see *Shaw* v. *Att.-Gen.*, *loc. cit.* But, as stated, *Maher* v. *Maher* was not decided on this ground: see now, however, *Igra* v. *Igra* [1951] 2 T.L.R. 670, 673.

On the second point taken, Barnard J. held that the Cairo document was "nothing more nor less than the registration of a divorce." As there were "no divorce proceedings, . . . no amount of notice would have enabled the petitioner to have contested the respondent's unilateral declaration of divorce." Later references, with

approval, of the learned judge to *R.* v. *Hammersmith* [1917] 1 K.B. 634, and to *Warrender* v. *Warrender* (1835) 2 Cl. & Fin. 488, where effective bilateral "agreements" for divorce made out of court are condemned, show that in his view no proceedings "without judicial proceeding at all" can be recognised in England. Barnard J. was not asked to consider *Sasson* v. *Sasson* [1924] A.C. 1007, where two British subjects who were Jews domiciled in Egypt obtained a divorce, by delivery of a letter (*gett*), before the Grand Rabbinat in Alexandria. The Privy Council held that this bill of divorcement, though not given by a court of law, was entitled to recognition by the British Consular Court in Egypt. "Now the Court of the domicile here could not grant divorce, but on the other hand it was bound . . . to acknowledge the validity of a divorce according to the religious law of the non-Christian subject. The situation seems identical with that which has often arisen in India. Divorce by means of the phrase known as 'talak' is not a ground which would be good by English law. None the less the British courts have often given effect to Mohammedan divorces. . . ." It may be noted: (1) The reference in *Sasson* is to "British" not to English courts, the Privy Council not in that case acting as an English court; but it may be queried whether this is a valid distinction. (2) In the *Hammersmith Case* the bill of divorce was sent from an address in England; in *Maher* there was no communication with the wife, and the whole transaction took place in Egypt. (3) It seems, in any event, that *Sasson* concerned a monogamous marriage, as did the *Hammersmith* and *Maher Cases*, but the dictum of the Privy Council would seem to be capable of including polygamous marriages. (4) It would seem, leaving aside the issues of service and natural justice, that if Mr. Maher had married, no matter where or whom, after the time of the Cairo divorce and before the wife's English decree, he could have been convicted in England of the crime of bigamy. (5) A. T. Lawrence J. gave as an additional reason for the *Hammersmith* decision that "it was contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure" (see Beale's approval, *Conflict of Laws*, 2, 703). *Sasson* seems to be distinguishable on this ground, whereas *Maher* falls within it. Doubtless many further distinctions may be drawn, but it would seem, though the decisions are the other way, that the fact that a divorce is not obtained in a court of law is of less importance than the fact that it is bilateral, or, possibly, unilateral.

On the last argument, that a Christian marriage cannot be dissolved by a method appropriate to a polygamous union, Barnard J. observed: "To hold otherwise would not only be contrary to the law as I understand it, but would both encourage and sanction the purely temporary unions of Englishwomen and foreigners professing the Mohammedan religion, during their limited residence

in this country." With respect, it seems drastic in view of the divorce laws pertaining, for example, in some of the states of the United States (if one must go far away from home), to limit this observation to Mohammedans. Marriages such as that in *Maher* are usually entered into with some knowledge of the risk involved.

Denning L.J. would probably have granted the wife in *Maher* a nullity decree, not a divorce; see *Kenward* v. *Kenward* [1950] 2 All E.R. 297, at p. 310: "When an Englishwoman marries a man of a polygamous race at a registry office in England, the substantial validity of the marriage as well as its formal validity depends on the personal law of the wife and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous." So, if the husband took a second wife in his own homeland, "that condition was broken and the marriage was voidable at (the English wife's) instance in our courts for failure of the consideration. She should get a decree of nullity." Under this reasoning, the Cairo divorce in *Maher* was clearly a breach of condition. It has been doubted, however, whether there is authority for the proposition advanced by Denning L.J., see 14 M.L.R. p. 77 *et seq.*

There is, finally, an interesting situation which may arise one day for clarification by the English courts. The facts would be more or less the same as in *Sasson*, except that the wife would have come to England prior to the delivery of the *gett* (in Jewish religious law it seems that the husband is not allowed to deliver the *gett* until the substantive case has been argued out before the Rabbinical authorities, and approval for his divorce given). In France, where such a situation has arisen, the courts, despite the fact that marriage and divorce are secular there, have declined, in somewhat extraordinary circumstances, to refuse recognition to the delivery; but they seem to have been overwhelmingly influenced by the fact that the case came before them at the instance not of the parties but of the mother of the second wife in the case, this mother it seems having acquired an acute disinclination to retain her newly acquired son-in-law. But there is a considerable French literature on this and allied subjects; see *Dame G.* v. *S.* (1949), reported 39 Rev.Crit. de Droit Int. Privé (1950) p. 57, with comment, pp. 58–62, by Y. Loussouarn: *cf.* "Divorce in Jewish Law," S. Daiches, 8 Jo.Comp.Leg. (1926).

JOSEPH JACKSON.

THE MEASURE OF DAMAGES IN FOREIGN TORTS

WHILST travelling in France, Lotte Kohnke, a woman resident in England, received severe personal injuries when a lorry driven by a Frenchman, Mahieu, collided with the car in which she was being driven by her employer, Karger. Mahieu was later prosecuted in

a French Correctional Court and found guilty of causing personal injuries by negligence to Karger and Mrs. Kohnke, both of whom, in accordance with French procedure, claimed in these criminal proceedings for damages in respect of their personal injuries. Substantial sums were awarded to each and, in connection with these civil claims, the French Court of Appeal apportioned two-thirds of the responsibility for the accident to Mahieu and one-third to Karger. After Mahieu and his employers had paid the damages awarded to Mrs. Kohnke they called on Karger to reimburse them one-third of the amount, and he did so.

In the meantime, however, Mrs. Kohnke had instituted proceedings against Karger in England, where they were both resident, and in due course the case of *Kohnke* v. *Karger*[1] came before Lynskey J. Since the parties differed from those in the French proceedings, which had in the meantime been completed, there was no question of *res judicata*, but the defence contended that the plaintiff had already received compensation for her injuries and was not entitled to double satisfaction, since "a satisfied judgment for a single damnum is a bar to another action for the same damnum based on any injuria causing that damnum."

This is clearly the position in respect of a satisfied judgment of an English court, but there was no clear authority where the judgment satisfied was that of a foreign court. Both *Barber* v. *Lamb* [2] and *Taylor* v. *Hollard*,[3] which were cited, were actions between the same parties for the same debt based on the same cause of action. In *Barber* v. *Lamb* the plaintiff, having sued in the Consular Court at Constantinople for £1,000, obtained judgment for £45, which was satisfied, and it was held that he could not then sue in England for the £1,000. *Taylor* v. *Hollard* went considerably further. The plaintiff had obtained a judgment in England for over £15,000 on a contract of loan and brought an action on the English judgment in a court of the Transvaal, where the defendant was domiciled. The Transvaal court refused to enforce the English judgment in full, holding the contract on which it was based to be usurious and unconscionable, but gave judgment for the plaintiff for nearly £10,000. The plaintiff eventually recovered this amount by sequestration in South Africa, and then sued in England for the balance of the original English judgment and interest. Jelf J. held, *inter alia*, that he was barred, not by the mere judgment in the Transvaal, but by the fact that, having proceeded to sequestration and accepted satisfaction of the judgment for the smaller amount, he had shown his acceptance of it.

In the present case the plaintiff had undertaken to give credit to the defendant for damages she had obtained against Mahieu, and Lynskey J. indicated that in any event he would have held

[1] [1951] 2 T.L.R. 40; [1951] 2 All E.R. 180.
[2] (1860) 8 C.B. (N.S.) 95.
[3] [1902] 1 K.B. 676.

that her damages against Karger must be reduced by the amount she had received as a result of the French proceedings, but he went on to say: "her election of one tribunal to deal with her claim against Mahieu and his employers, even when she obtains judgment which is satisfied, will not avail Karger except to the extent that her damages have been in part satisfied by money recovered from Mahieu." The distinction from *Taylor* v. *Hollard* was, of course, the fact that here different parties were concerned.

The question at issue was therefore whether the plaintiff had a valid claim against the defendant for which no satisfaction had yet been received, and on this Lynskey J. said: "The principles on which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts"; he then assessed damages in accordance with English law and indicated three divergences from the assessment in the French courts. These were:

(i) When the French courts assess damages in a claim grafted on to penal proceedings for causing personal injuries by negligence, the claimant cannot recover for damage to property, *e.g.*, for the loss of a wrist watch.

(ii) As a claim can subsequently be made in France for aggravation of injuries, the risk of such aggravation presumably is not taken into account in assessing the damages, whereas in England damages are assessed once and for all.

(iii) In the French courts the general damages vary according to the social position of the injured person, apart from loss of earning capacity.

As to (i), no evidence appears to have been offered of French law on damage to property, or whether Mrs. Kohnke could have recovered for such damage in any French court other than that in which she had already made her claim. In the absence of evidence to the contrary, the presumption is that foreign law is the same as English. Thus any small damages awarded on this score were rightly given in the English proceedings.

But as regards headings (ii) and (iii), Lynskey J. appears to have awarded in the English action damages which, under French law, would not have been recoverable either (for (ii)) immediately, or (for (iii)) at all, although there can be no doubt that a French tort was involved. No authorities were quoted for Lynskey J.'s proposition that damages must be assessed according to English law; but it seems that he was applying the rule in *Machado* v. *Fontes*,[4] in which damages were awarded in England for the publication in Brazil of a libel for which no damages could have been recovered there, although publication was an offence. In that case Lopes J. said: "directly the right of action is established in this

[4] [1897] 2 Q.B. (C.A.) 231.

country . . . the ordinary incidents of that action and the appropriate remedies ensue. Therefore, in this case, . . . damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country." This doctrine, under which the law of the forum modifies the substance of the foreign tort, and the extension of it by which the law of the forum decides the measure of damages even where the law of the tort gives a remedy of the same nature, has been extensively attacked.[5] It has been described,[6] *inter alia*, as " at glaring variance with the policy . . . that a plaintiff should not be given an undue advantage by a fortunate choice of a forum." In this case there was added an undue disadvantage to the defendant, who had been adjudged only one-third responsible for the accident, but was made solely responsible for damages recoverable by English but not by French law, with little hope of obtaining any contribution from a tortfeasor not amenable to the jurisdiction of the English courts.

O. M. Stone.

Pre-Trial Publicity

In some European countries there is no check upon newspaper comment pending trial. We in England pride ourselves upon a different rule, but *R.* v. *Armstrong* [1951] 2 All E.R. 219 draws attention once again to a serious limitation upon it. The accused, charged with larceny, applied to the justices for bail, and on that application his previous convictions were disclosed. Local newspapers reported—even, it was suggested, misreported—these previous convictions. The Court of Criminal Appeal, while expressing the view that it was very undesirable that such information should be published, refused to quash a subsequent conviction.

There are few points of law reform on which there is greater unanimity of opinion than that publicity of preliminary proceedings should be curtailed. Quite apart from the possibility of disclosure of previous convictions, as occurred in the instant case, it is frequent for the accused to reserve his defence, and the publication of the evidence for the Crown thus tends to give a one-sided impression of the facts of the case. Hence it has frequently been suggested that where the accused is committed for trial there should be no report allowed except the charge and the name of the accused. A proposal of this type had the support of Sir Tindal Atkinson (the D.P.P.) and Sir Archibald Bodkin at the Departmental Committee on Coroners in 1935, and it was again put forward by the Chief Clerk of Bow Street Magistrates' Court, Mr. Albert Lieck, in his book, *Bow Street World*, pp. 137–8, and by Dr. C. K. Allen in

[5] See Dicey's *Conflict of Laws*, 6th ed., pp. 801–2, notes 14 and 22, and especially G. C. Cheshire, *Private International Law*, 2nd ed., pp. 304–8, M. Hancock, 22 Can. Bar Review 853, and A. H. Robertson, 4 M.L.R. 27.

[6] 22 Can. Bar Review 853.

a letter to *The Times*, April 21, 1949. Well-known examples of prejudice being caused by the present system are the Rutherford trial of 1919 (see E. S. Fay, *The Life of Mr. Justice Swift*, p. 44) and the Rouse trial of 1931 (see G. de C. Parmiter, *Reasonable Doubt*, p. 58). In Scotland the problem does not arise because there is no preliminary hearing, and no coroner's inquest. See Lord Normand in (1938) 54 L.Q.R. 345. A radical school of thought would have us follow the Scottish example : see Kenny, *Outlines*, 15th ed., pp. 539–40; Mullins, *Fifteen Years' Hard Labour*, pp. 70ff. This seems to be going too far (cp. Orfield, *Criminal Procedure from Arrest to Appeal*, 61, 72–5, 96–100), though there is surely much to be said for abolishing the coroner. Let us agree, at any rate, on turning the preliminary examination into a hearing in camera. And here the would-be reformer can bring out his trump card : to ask for legislation in England is to cry for the moon, but this particular reform could be effected by a simple recommendation from the Lord Chancellor: see Indictable Offences Act, 1848, s. 19.

GLANVILLE WILLIAMS.

DISCRETION OF SPECIAL JUDGE ON PATENT MATTERS—APPEAL

IN *Sageb's Claim* (1951) 68 R.P.C. 73, Mr. Justice Lloyd-Jacob, the special judge dealing with patent matters, had refused to order a preliminary point to be determined under Ord. 25, r. 2, in advance of the hearing on the general issue and had also refused to order the striking out under Ord. 19, r. 27, of certain allegations in the Statement of Claim as irrelevant and embarrassing. The Court of Appeal upheld this ruling by Lloyd-Jacob J. on the ground that it was justified on the facts and the points of law involved, and stated that the Court of Appeal would not lightly interfere with the discretion of the trial judge on procedural matters of this nature. So far the decision of the lower court and the Court of Appeal in *Sageb's Case* are in accordance with precedent and contain nothing novel. The Court of Appeal, however goes on to say that " now Parliament in its wisdom has decided that a patent judge should deal with these matters," the Appeal Court should hesitate even longer before interfering with discretion of that judge on a matter of procedure in a patent case. This is a dangerous doctrine. It is evidently most desirable that the Court of Appeal should generally be very careful before interfering with the discretion of any trial judge on a matter of procedure and in the particular case the decision of Lloyd-Jacob J. was perfectly correct. It is, however, submitted that the Court of Appeal would fail in its function to correct errors by the trial judge in patent matters if it takes the attitude that this judge, being a special judge, knows these matters

better any way, while the appeal judges—not being specialists—have not got the requisite knowledge.

The appointment of the special judge to deal with patent matters, which was recommended by the Patent Law Reform Committee, is a great step forward towards the proper and expeditious decision of patent cases, although the Lord Justice of the Appeal Court when referring to the " wisdom of Parliament " seems to doubt this. Incidentally, section 49 of the Patents and Designs Act, 1949, under which the judge is appointed, merely provides that " the number of puisne judges of the High Court . . . shall be increased by one "; the Act states neither that he shall be a specialist in patent matters nor that all patent infringement cases shall be tried by him. It is only by inference from the recommendations of the Patent Law Reform Committee and the fact that such an appointment is ordered by the Patents Act that the conclusion can be drawn that he should be a special judge for patent matters. Be that as it may, it certainly does not follow that because he is a special judge Parliament desired the Court of Appeal to interfere less with his discretion than with the discretion of any other judge. Indeed, just because he is a special judge and all patent cases are centralised in his hands, the danger is all the greater that once he selects the wrong groove he drives deeper and deeper into it and must be directed back to the right road by a higher court. In this connection it is interesting to note that the Court of Appeal, while upholding the tenor of the decision of the patent judge in *Sageb's Case*, expressed difficulty in understanding his *ratio decidendi*. All this shows that control by the Court of Appeal over the discretion of the special patent judge is just as necessary, if not more necessary, than over the discretion of any ordinary trial judge.

P. Meinhardt.

Austrian Nationality

In the *Matter of Mangold's Patent* (1951) 68 R.P.C. 1, Lloyd-Jacob J. had to deal with an application for extension of a patent on the ground of loss suffered " by reason of hostilities between His Majesty and any foreign state." Under section 24 (8) of the Patents Act, 1949, if the applicant " is a subject of such foreign state," no order for extension can be made. The learned judge held that the applicant who was of Austrian origin and had resided in this country since 1937, was disentitled to an extension, because on March 13, 1938, Austria was annexed by Germany and, on April 2, 1938, such annexation was recognised by His Majesty; consequently, the applicant was a German subject, unless he could prove that " by German municipal law " he was not so regarded. The recognition of Austria as a State on January 5, 1946, and the termination of the state of war with Austria on September 16, 1947,

were held to be irrelevant on the ground that the latter did " not necessarily imply the existence of any state of war between His Majesty and the State of Austria prior to such recognition."

It would be beyond the scope of these comments to discuss the difficult question how, in international law, the recognition in 1946 affected the character of the events in 1938, if recognition was then granted to them by His Majesty. It must suffice to draw attention to some of the narrower grounds making the decision noteworthy. In the first place, it again illustrates the working of the principle of precedent, for it was arrived at in ignorance of the decision in the *Matter of Application for Patents by A. B.* (1944) 61 R.P.C. 89. In that case Morton J. (as he then was) held that in view of certain statements made from time to time by Ministers in Parliament, Austria had to be regarded as being in existence and as a country for which Great Britain had drawn the sword, and that, therefore, it was open to the then applicant to describe himself as being " of Austrian nationality," his actual nationality not falling to be decided. Moreover, Lloyd-Jacob J. proceeded from the assumption that in 1938 this country had in fact recognised the annexation of Austria, although it was declared " null and void " by the Declaration of Moscow of October 30, 1943, and although for this among other reasons the effect of such recognition as this country ever granted to the annexation is not free from doubt: see Lauterpacht, *Recognition in International Law* (1947), pp. 399, 400. Again Lloyd-Jacob J. was not made aware of the strongly supported view that, in the absence of submission to the new sovereign, an Austrian who in March 1938 resided outside Austria, became stateless: *United States, ex. rel. Schwarzkopf* v. *Uhl* (1943) 137 F. 2d 898, A.D. 1943–1945 No. 54, and *cf. Murray* v. *Parkes* [1942] 2 K.B. 123 as explained in *Effects of Changes of Sovereignty upon Nationality*, (1942) 5 M.L.R. 218. Lastly, however, the most serious aspect of the decision is to be found in the fact that it involved matters of State of great international significance and far-reaching repercussions, which were decided without reference to the Foreign Office, though according to well-established rules it clearly ought to have been consulted. The gravity of the omission is emphasised by the fact that another Department of the Crown, *viz.*, the Board of Trade, was represented by counsel and apparently opposed the application. Thus fuel is added to the fire of those who feel that, for the sake of this country's reputation, in matters international some method must be found to ensure the proper instruction of the court on the facts and the law. There is a body of opinion that favours the adoption of the American practice requiring all " political questions " to be decided by the executive. Even those who are critical of that practice, or at least of certain of its consequences and ramifications, must admit the need for reform. In the present case it would perhaps be an appropriate gesture if the Crown, whose Board of Trade ought to have known better,

made arrangements for an elaborately argued reconsideration of the question and thus anticipated Austrian initiative in the courts or on a diplomatic level.

F. A. Mann.

Anglo-Iranian Oil Company Case

(Interim Measures of Protection) (1951) I.C.J. Reports 1951, p. 89.

On May 26, 1951, the United Kingdom had referred to the International Court of Justice its dispute with the Government of Iran concerning the " nationalisation " of the Anglo-Iranian Oil Company. When so doing it had reserved the right to request the Court to indicate interim measures of protection should that become necessary. On June 22, 1951, the United Kingdom, invoking article 41 of the Court's Statute, authorising the Court " to indicate any provisional measures which ought to be taken to preserve the respective rights of either party," filed a request for such interim measures to be indicated.

Interim measures may be compared with the municipal injunction, and become necessary if either of the parties is about to take action which would cause irreparable damage to the other, for example, would take some action which could not be corrected by the payment of monetary compensation, or which would aggravate the dispute. As is well known, the dispute between Great Britain and Iran relates to the expropriation of the oil company by the Iranian Government. The last thing desired by the United Kingdom was compensation, while restitution would certainly not be granted by the Iranian authorities. The purpose of the British application was to prevent the execution of the Iranian nationalisation law and to secure preservation of the *status quo* with the company exercising its rights under the 1933 agreement until such time as the Court decided whether or not Iran was legally entitled to nationalise the company. If, in the final result, the Court decided that Iran was not so entitled, not to award the measures of protection requested would mean that the company would be adversely affected in the meantime to such an extent that it could not be placed again into the position to which the Court would ultimately have considered it entitled.

The Permanent Court of International Justice had demonstrated the nature of interim measures of protection in the case concerning the *Electricity Company of Sofia* (1939). It had then said that the purpose of such measures was to uphold a " principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." This principle had

been carried into effect by the Permanent Court in 1927 in a case which very closely resembled the dispute between the United Kingdom and Iran. In the case of the *Denunciation of the Sino-Belgian Treaty* the Court was faced with a request from Belgium for interim measures to prevent China from carrying out the threatened denunciation. The Court said that " in the event of an infraction—a contingency rendered possible by the situation resulting from the publication of the aforesaid Chinese Presidential Order—of certain of the rights which Belgium or her nationals would possess in China if the Treaty of November 2, 1865, were recognised as still operative, such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form." It requires only slight alteration of this quotation to make it apply to the Anglo-Iranian oil dispute.

Iran refused to appear and maintained in a communication to the Court that it should not award interim protection because the issue was not one which Great Britain could refer to the court. Rightly, the Court pointed out that this contention related to the merits of the dispute itself and should not be allowed to interfere with a claim for interim protection. Such measures would only have a standstill effect. If the final decision, either on the jurisdiction or merits, were in favour of Iran the latter would not suffer in any way by the delay. If, however, it were in favour of Great Britain, to refuse to consider the application for temporary measures would result in that country suffering severe loss.

The Court pointed out that the British Government alleged a violation of international law by the breach of the concession and by a denial of justice resulting from the Iranian refusal to submit the matter to arbitration in accordance with the 1933 agreement. For these reasons the Court held that " it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction," and considered itself competent to entertain the request, regardless of the Iranian refusal to appear to contest it. In so doing the Court explained that its decision in no way prejudged the ultimate question of the Court's jurisdiction which Iran would be able to attack at the hearing on the merits. The Court considered that provisional measures were necessary to preserve the rights which might subsequently be adjudged to either party by the Court.

The interim measures indicated by the Court were intended to preserve the *status quo* as it existed prior to the enactment of the Iranian nationalisation decree, and, in order to ensure that nothing was done by the company which might prejudice the rights of Iran should that State be successful at the hearing on the merits, a Board of Supervision was to be established by the two countries acting together. Judges Winiarski (Poland) and Badawi Pasha (Egypt) dissented from the Court's judgment. They could not agree that, in case of doubt, jurisdiction should be presumed. They were of

opinion that the Court should summarily have considered this point, and they felt that had it done so it would have reached the provisional conclusion that it did not possess jurisdiction.

By Article 41 of its Statute the Court is required to report the interim measures it has recommended to the Security Council, and by Article 94 of the Charter the party which has been successful in proceedings may have recourse to the Security Council if the other party fails to carry out the judgment. Iran refused to recognise the interim order, and denounced its acceptance of the compulsory jurisdiction of the court under the "Optional Clause." Nevertheless, at first Great Britain satisfied herself by merely declaring that the Iranian refusal amounted to a further breach of international law. Later, Great Britain referred the Iranian refusal to the Security Council only to receive a rebuff from that body which refused to do anything in the matter.

REVIEWS

ADDINGTON, AUTHOR OF THE MODERN INCOME TAX. By A. FARNSWORTH, LL.D., PH.D. [Stevens & Sons, Ltd. xii and 140 pp. 21s.]

IN this interesting work, Dr. Farnsworth publishes the results of some of his recent researches into the early history of income tax in the United Kingdom. He observes that several historians, including some who have dealt in detail with the period and personalities involved, have regarded William Pitt as the financial genius to whose inventive mind we owe our system of income tax, and his contemporary Henry Addington, who was Prime Minister and Chancellor of the Exchequer from 1801 to 1804, has equally been looked upon as incompetent in financial matters and as having contributed little or nothing of merit to the system of taxation and the conduct of the nation's finances, but rather brought them near ruin. Dr. Farnsworth has had access to Henry Addington's personal papers, surviving in the hands of the present Viscount Sidmouth, which appear not to have been previously drawn upon by historians in dealing with the financial history of these times, and his book contains an enlightening account of the early history of income tax from its inception in 1799 until 1805 based entirely upon original contemporary documents.

He shows that Pitt in his Acts of 1799 first introduced the idea of a general tax on income of every form. Pitt's scheme was, however, too idealised to work well particularly as such a tax was novel and received with great hostility. This tax was at the rate of two shillings in the pound upon the aggregate income of each person after deduction of any annual interest upon his debts, any annuities payable by him and any allowances made by him to relatives. Pitt considered, apparently rightly, that public prejudice would not allow him to require detailed returns of income, in particular ones revealing the extent of the indebtedness of the taxpayer. Accordingly his Acts provided that each person should make a return to Commissioners declaring his willingness to pay a sum specified by him and certifying that sum to be not less than one-tenth of his income calculated in accordance with the rules and after making the deductions allowed in the Acts. If the Commissioners had reason to believe such a return inaccurate or fraudulent they were empowered to call for a detailed return, but in practice although a large proportion of the returns understated income the Commissioners were reluctant to call for these detailed returns except where there were demonstrable grounds for doubt. In any event fictitious debts bearing interest were readily invented by taxpayers who could not be compelled to disclose the identity of their supposed creditors.

Addington succeeded Pitt in March, 1801. Shortly after he entered into office, the Peace of Amiens brought a temporary respite in the war with France, and in Addington's first budget in the spring of 1802 he announced his intention of repealing the income tax. The tax which he reintroduced on the renewal of the war in May of the following year was founded on a much more effective principle. This was the principle that wherever possible tax should be collected and deducted by the person paying the income. It was a principle found in the Land Tax, which in its inception in 1692 was a form of income tax upon certain kinds of income, not only income from land. The language of some of the provisions of the Income Tax Act, 1918, is, in consequence, virtually the same as that of the seventeenth-century Acts imposing that tax.

Addington introduced the division of income into Schedules A to E and the six Cases of Schedule D with which we are familiar today, and wished to

apply deduction at source to income from land, interest, dividends, governmental offices and pensions. This accounted then and in 1919 for about 70 per cent. of the income charged with tax. Deduction at source avoided requiring a return of any income except those forms not so taxed, or of interest on debts, since the taxpayer obtained relief on account of such outgoings by keeping the tax he had deducted in paying them. Owing to Pitt's opposition, Addington was compelled to abandon the taxation at source of income from the funds, but this was made lawful in 1806. His Act of 1803 has been the model for the main provisions of all subsequent income tax legislation, including the Income Tax Act, 1918, and the Consolidating Bill now before Parliament. Its language has, some would say unfortunately, been copied with but little variation. Dr. Farnsworth shows that Addington's scheme produced a yield almost as large as Pitt's though with half the rate of tax. It was adopted with only minor changes by Pitt himself in his Act of 1805. Other countries have found that without a system of deduction at source there is, even at the present day, much evasion of income tax upon, for instance, company dividends.

It is to be hoped that Dr. Farnsworth will be rewarded by the absence from future literature of misattributions, such as those he quotes, of the 1803 Act to Pitt or its scheme to Pitt's 1805 Act.

P. W. E. T.

International Law and Human Rights. By H. Lauterpacht. [London : Stevens. 1950. xvi and 475 pp. £2 10s. net.]

The two main objects of Professor Lauterpacht's book are clearly indicated at the outset. The first is the "exposition of the existing law, as enshrined in the Charter of the United Nations, relating to the international recognition and protection of human rights and fundamental freedoms. The second is the consideration of the problems arising out of the proposals made for the extension of the existing law, . . . through the adoption of an International Bill of the Rights of Man."

But the real clue to the whole work is probably to be found in another passage in the book, where the author expresses the view that: "It is not likely that the gradual integration of international society in the direction of a supranational Federation of the World—a development which must be regarded as the ultimate rational postulate of the political organisation of man—will be achieved by sudden and drastic changes in the legal organisation of mankind. But it may be brought nearer to realisation by the gradual adoption of the fundamental principles of a federal government. Of these, the direct subordination of the individual to federal law, in his capacity as a subject of the law of the Federation, is a vital link. Here lies the deeper significance of the affirmation of the principle that the individual is a subject of international law in the domain both of rights and of duties" (p. 46). The author believes that the "idea of an all-embracing Federation of States must be regarded not as an infinite ideal but as an object of a moral duty of positive action and as a practical standard of human endeavour" (p. 456).

It seems, therefore, that there is for the learned author a moral duty to advance the idea of a world federation. The discussion of the problems of international protection of human rights and especially the "affirmation of the principle that the individual is a subject of international law" are but steps towards that goal (*cf.* pp. 462–3).

Such an approach appears to have a definite influence upon the author's "exposition of the existing law." Thus the author, with great learning and ingenuity, puts forth the view that "having regard to the inherent purposes of international law, of which the individual is the ultimate unit, he is in that capacity a subject of international law" (p. 61); that, furthermore, "the

Charter of the United Nations, in recognising the fundamental human rights and freedoms, has to that extent constituted individuals subjects of the law of nations" (*ibid.*; see also pp. 33–5, 159–60); that the word "intervene" in Article 2 (7) of the Charter, which prevents the United Nations from intervening "in matters which are essentially within the domestic jurisdiction of any State" implies only "coercive intervention" (p. 180); and that "the legal duty [in the Charter of the United Nations] to promote respect for human rights includes the legal duty to respect them. It comprises, in addition, the obligation to further the adoption of means and establishment of agencies for the effective international enforcement of these rights," even though the Charter does not provide for such enforcement (p. 152).

Thus by the simple process of expounding, or rather reinterpreting the "existing law," the "vital link" towards a supra-national Federation of the World is supplied. The following is an instance of such reinterpretation: "Thus, in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of stating the legal position is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere" (p. 27). To quote here the authority of the Permanent Court of International Justice to the effect that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a State is in reality asserting its own rights*—its right to ensure, in the person of its subjects, respect for the rules of international law" (A.2, p. 12; see also A.17, p. 28), would perhaps be guilty of being "hidebound by the traditional approach." But with regard to the meaning of the word "intervention" in the Charter, where the intention of the framers of the document appears to have been otherwise, the author does not hesitate to rely strongly upon the "technical" and "current interpretation" of the term (p. 167).

The universal and effective respect for human rights and fundamental freedoms is no doubt the cherished wish of every right-minded individual and it should no doubt be, in Professor Lauterpacht's resonant phraseology, "an object of a moral duty of positive action and . . . a practical standard of human endeavour." Everyone should indeed feel much indebted to him for pursuing the subject with an almost missionary zeal—the present book being but the latest of a series of contributions. But to borrow and adapt another passage from the author's highly stimulating work: "the determination to [pursue this high ideal] . . . ought not to interfere with the duty resting upon the science of international law to abstain from infusing an artificial [interpretation into the existing law]. . . . Any attempt to do so must prove abortive in the long run. If made, with temporary appearance of success, it would tend to weaken efforts in the direction of true progress" (p. 417).

B. CHENG.

INTRODUCTION TO ENGLISH LAW. By PHILIP S. JAMES, M.A., of the Inner Temple, Barrister-at-Law, formerly Fellow of Exeter College, Oxford. [London: Butterworth & Co. (Publishers), Ltd. 1950. xvi and 409 and (index) 21 pp. 12s. 6d. net.]

THIS introductory book for students covers the waterfront, from the basis of law, the legal system and the courts, to contract, torts, property, crime and the like. It contains much useful material and many lucid passages, but in its present state it cannot safely be put into the hands of a beginner. In addition to some bad mistakes, there are too many minor inaccuracies, loose ends and faults of emphasis; and valuable though it is for a beginner to get some idea of the stuff law is made of, the implantation of wrong ideas at the outset may do him harm for many years to come, as well as providing his teachers with more than the usual number of weeds to eradicate.

Some examples must suffice. Thus to take the 54 pages on real property, on p. 330 the book is dealing with settled land and the Settled Land Act, 1925, and mentions that two deeds are now required to create a settlement. "The one deed, called a 'trust instrument,' conveys the land to the trustees and declares the trusts upon which it is to be held. The other deed, called a 'vesting deed,' declares the land to be vested in the person who is for the time being entitled to the enjoyment of it as tenant for life." Now the beginner is not to know how wrong it is to say that the land is conveyed to the trustees, and if he makes anything at all of the two sentences, he will probably conclude that there is an important but unexplained difference between "conveying the land" and "vesting the land"; after all, not even the mysterious law is likely to require a vesting deed to tell a direct lie about who has the legal estate. As the beginner reads on, he may think he has found an explanation when he reads the summary at the foot of the same page—

"(i) Land subject to a strict settlement is in the first place conveyed to the settlement trustees, who thus hold the legal estate in fee simple.

(ii) The vesting deed makes the tenant for life 'estate owner' for the purpose of selling the land. . . .

(iii) A purchaser can and must deal with the person declared in the vesting deed to be the tenant for life, as if he were the owner of the fee simple."

This, the student may feel, shows that although the legal estate is really in the trustees, for the purpose of selling it, all concerned pretend that it belongs to the tenant for life. When at the conclusion of his summary the author adds (for another purpose) "Thus the paradox is consummated," the student's cup is filled.

Again, two pages later, it is said that trustees for sale, who have all the powers of a tenant for life, may delegate "these powers" to "any person for the time being entitled to possession of the land under the terms of the trust"; in fact, only the powers "of and incidental to leasing, accepting surrenders of leases and management" may be so delegated, and delegation is to "any person of full age . . . for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period" (Law of Property Act, 1925, s. 29 (1)). In an Introduction, it is indeed permissible and desirable to omit details and qualifications, but why misstate the scope of the power and why substitute "land" for "rents and profits"? And although it is true, as is said on the next page, that a trust for sale may be created by one deed, it is misleading to do so without any warning that this is the exception rather than the rule. The next page enshrines an old students' misapprehension; the case is taken of a limitation to A in tail, and it is said that if "A's eldest son, D, who is due to take next, attempts to disentail without A's consent, he will only be able to give himself a base fee." In fact, having no more than a *spes successionis,* D has nothing which he can bar, and cannot even create a base fee. Again on p. 312, the book states that an owner of a fee simple can convey it "by the use of any words which indicate any intention to part with it. Thus, where A, the tenant in fee simple, grants land 'To B,' in the absence of clear evidence of a contrary intention, B will acquire the whole fee simple." Apart from the insertion of a requirement of "clear evidence," which is not to be found in the Law of Property Act, 1925, s. 60 (1), the presence of a positive intention is thus exemplified by the absence of any contrary intention; well might a student who absorbs this lesson treat contracting in and contracting out as one.

On pp. 310–312, under the heading "The nature of a fee simple," over two-thirds of the space is devoted to the Town and Country Planning Act, 1947. Starting with the premise that "Formerly the rights of landowners were great. An Englishman's home was his 'castle,'" the conclusion is reached that "The Act has in fact reduced the Englishman's vaunted right to his 'castle' to a spectre." This is misleading twaddle. The earlier town planning

Acts (which are not mentioned here) had already imposed a control of development nearly as strict as that under the Act of 1947, and the third of the three objects which the Act was stated to have ("to achieve a planned physical lay-out of town and country alike") also existed under the earlier law. How, then, can it be said that the second of the objects, namely, the imposition of liability to development charges, has had the dramatic effect claimed, especially as the Act could have little effect on the castle unless the owner was proposing to "develop" it?

On p. 314 it is said that the "right to possession" under a lease must be "intended to take effect within 21 years of the grant; any grant which purports to postpone the right for a longer period is invalid." The Law of Property Act, 1925, s. 149 (3), in fact does not deal with the right to possession, but only the taking effect of the term, so that if the term commences to run within the period, it matters not that the lease takes effect in reversion and not in possession. Again, on p. 319, it is said that a tenant cannot contract out of his rights under the Landlord and Tenant Act, 1927, "without leave of the court," which is certainly not what section 9 says. On the same page, in stating what premises the Rent Acts apply to, it is said that "the premises concerned must not exceed a certain rateable value. This value is determined upon a basis (or, more correctly, upon bases, for there are two methods of valuation) which ensures that the vast majority of premises may become subject to control." Apart from the possible picture of the rating system having as its objective the bringing of most houses within the Rent Acts, the unexplained bracketed words are likely to puzzle rather than assist the beginner. Yet again, the treatment of *Walsh* v. *Lonsdale* on p. 315 is unhappy in that the result is made to depend upon a supposed rule that even though it has been agreed that "rent should be paid yearly in advance," "a year's rent cannot be demanded in advance in the case of a yearly tenancy." "The principal rights of a legal mortgagee" are said to be possession, foreclosure, sale and an action on the personal covenant; even if for "rights" one reads "remedies," it seems curious to devote a paragraph each to possession and the action on the covenant, and not even to mention appointing a receiver (p. 345).

If the reader turns from real property to other subjects, similar defects appear. Does p. 71 convey the right idea to a beginner by saying that a plaintiff starts an action by "purchasing" a writ of summons, or that entering an appearance means "signifying in writing to an official of the court an intention to defend the action" (when no word of such an intention is contained in the appearance)? How often in an Order 14 Summons does the plaintiff swear an affidavit "before a Master" (p. 73)? When even the cases important enough to be reported show that more often than not the Judicial Committee of the Privy Council includes one or two members not entitled to sit in the House of Lords, is it right to say that the judicial staff of the Committee is "virtually that of the House of Lords" (p. 52)? Why give the composition and number of members of the old Court of [*sic*] Crown Cases Reserved and say nothing about either in the case of the Court of Criminal Appeal (pp. 49, 50)? Is it wise to say that since 1834 the Old Bailey has been the assize court for London, when it has just been pointed out that assizes take civil work and some divorce business; and do only King's Bench judges go circuit (p. 46)? What esoteric distinction is there between mandamus and prohibition, the former "issuing from the High Court" whereas the latter "issues out of a Higher Court" (p. 162)? Does petit treason merit five lines (p. 185) when the Statute of Uses is not even mentioned? Which of the "modern enactments" have "prohibited an appeal to the courts" in the case of rent tribunals (p. 164)? Is it true that "all disputes concerning compulsory acquisition of land" are to be submitted to the Lands Tribunal (p. 170), or is it to be assumed that nothing except matters of compensation provoke disputes? Will beginners be helped by being told that the rule that an acknowledgment may make a statute barred debt actionable is an exception to the rule that consideration must not be past (p. 237)? And, *pour rire,* how many

readers will assume from the repetition of the word "took" (instead of "used") on p. 227 that the unfortunate Mrs. Carlill swallowed the smoke ball? (Incidentally, a distinguished member of the present Court of Appeal can speak with personal knowledge of the consideration which moved from those who used these balls.)

But this catalogue of samples must close. It may perhaps be said with some justice that too much space has been devoted to reviewing a beginner's book; yet beginners are tender plants, requiring the highly skilled treatment which is demanded by any attempt to combine lucidity, comprehensiveness, brevity and accuracy. It is important that the tasks of those who are so often both infants and, in matters of law, lunatics (or so their teachers would say) should not be made harder by exposing them at the outset to a text in which they cannot place implicit trust. One must grieve for all the work that has gone into this book, published at so reasonable a price, and for the many sound and telling passages that it contains, in bulk greatly exceeding the defects; but the strength of the chain of learning is that of its weakest link, and at present the weak links of the book are both too many and too frail.

R. E. Megarry.

The Law of Torts : A Treatise on the Law of Civil Wrongs. Fourth Edition. By S. Ramaswamy Iyer, b.a., b.l., Advocate, High Court, Madras. [Calcutta : Eastern Law House, Ltd. 1950. lxvii and 704 pp. (with index). Rs. 16; £1 5s.; $4.]

The first edition of this treatise, which was published in 1932, was described by Holdsworth in his Introduction as "a valuable addition to the existing text-books on this subject," containing "an accurate and well arranged summary of the principles of this branch of law," with "a comparative and a jurisprudential flavour." It was apparently received by the legal profession in India "as a book of outstanding merit" (preface to the second edition), and it is therefore somewhat surprising that the book should be so little known in the Anglo-Saxon legal world. It is true that brief notices of the first edition appeared in the law reviews, and that in 1939 Winfield welcomed the second edition as "a reliable statement of the English law on the topic" and pronounced it free from "intellectual rickets" and "quite capable of standing upon its own legs" (55 L.Q.R. 126). Nevertheless, it remained comparatively obscure until the present edition. This edition, however, has been deemed sufficiently important to warrant detailed review, and considerable differences of opinion have already been expressed as to its merits. (*Cf.* the very favourable review by Cecil Wright, 29 Can. Bar Review 555, with the extensive criticism voiced by Edward F. George, 67 L.Q.R. 389.) The present reviewer does not propose to take sides in this matter, although he inclines towards Dean Wright's more favourable view. Instead, he will merely record his own impressions and indicate what appear to him to be the salient features of the book, in the hope that in this way he may tempt some folk to get hold of it and judge for themselves.

The first impression is one of amazement at the remarkable erudition of this truly learned author. Indeed it is possible that the book is over-burdened with authority, so extensive and copious is the citation of English, American and Continental case law and academic literature. Certainly there is little that has been overlooked.

Secondly, there is admiration for the author's extraordinary grasp of the more difficult tort problems and his sound historical approach. There can be no doubt that he has drunk deep at the fountain. Such authorities as Pollock, Maitland and Holdsworth are constantly referred to, and many passages show how well the author appreciates the significance of the past and assesses the trends of the present in the development of the law of tort.

Thirdly, there is envy of the liberty which courts in India now enjoy to mould the law of tort according to their own ideas, and of the consequent freedom which the author feels with regard to the exposition of his subject. As he says in his preface to the fourth edition, "the Indian Law of Torts is today independent of the English law, and while English rules and cases still furnish valuable guidance, a far more critical and independent outlook can be brought to bear on them now than was done formerly." The result is most refreshing and stimulating to the English reader. The author does not hesitate to express his view that certain decisions of the English courts are bad and should not be followed in India, for example, *Malone* v. *Laskey, Cavalier* v. *Pope, Ball* v. *L.C.C., Jacobs* v. *L.C.C., Sutton* v. *Bootle Corporation, Le Lievre* v. *Gould, Bradford* v. *Pickles,* and *Rylands* v. *Fletcher.* The Indian law of tort already differs from the English law in several respects, for example, slander in any form is actionable *per se,* and the Rule in *Smith* v. *Selwyn* does not apply. We may now expect further departures. If the differences are not yet very great, this may be due in no small part to Mr. Iyer's success in imparting to others the tremendous enthusiasm which he obviously feels for the English system.

One of the most striking features of the book is the unusual plan of exposition adopted by the author. He discusses the specific torts first, and he does not begin to consider the general principles of liability until page 399, while the chapters on the general defences and remedies follow at the end of the book. Negligence and liability under the rule in *Rylands* v. *Fletcher* are not discussed under the heading of specific torts but under principles of liability. This arrangement is in accordance with the author's desire to examine torts from the point of view of breach of right and also with his belief that all tortious liability is capable of being attributed either to intentional or negligent conduct, the instances of absolute, vicarious and statutory liability being regarded as exceptional and anomalous. The result can hardly be described as felicitous. The intentional or negligent infliction of bodily harm is raised to the status of a tort, a species of the genus Injuries to the Person. *Rylands* v. *Fletcher* is confused with Nuisance, for example, at page 214, and is in any case disapproved. The chapter on Nuisance is not very convincing, and the chapter on Negligence suffers from being forced into the author's delictual strait-jacket.

On the other hand, one must say that the chapter on Defamation is very good, and so are the chapters on Interference with Contractual and Business Relations, and on Conspiracy. There is an interesting discussion of liability for inflicting nervous shock, and also on the right of privacy. The importance of *Donoghue* v. *Stevenson* is clearly brought out, and the author's desire to approach such matters as the duties of occupiers to persons coming upon their premises and of vendor of land to vendee, without feeling himself bound by any "rigid dogma" (see page 441), is particularly valuable. Recent case law is noted and incorporated into the text where necessary to an extent which puts current English publications in the shade.

A major weakness of the book is the vast number of errors which it contains. These cannot all be excused by the exigencies of publishing in India, and many of them are errors of law. A good deal more care should be taken to eliminate them in future editions. The following are just a few examples:— The title to page v should read Preface to the First Edition, not the Second; page 23, n. 2, it is not strictly correct to refer to the Act of 1925 as the latest Workmen's Compensation Act; page 34, line 2, should read "insofar as it was consonant . . ."; page 38, line 5, Chapter XIII on Injuries to Miscellaneous Rights is wrongly referred to as belonging with the chapters on principles of liability, whereas it belongs with the chapters on the different kinds of torts; although one of the references to the case of *Manindra Nath* v. *Mathura Das,* namely the reference at page 72, n. 3, is corrected in the corrigenda, the same case is incorrectly referred to on the opposite page, and is not corrected!; page 247, n. 4, the reference to the Report of the Committee on the Law of Defamation

does not give the Command No., and the Report is incorrectly described in the text on the same page as a report of the Law Revision Committee; it is no longer true to say, as is said at page 293, n. 4, and page 303, n. 2, that the plaintiff in libel cases can deliver *Elliott* v. *Garrett* or *Plymouth Mutual* interrogatories: see the amendments to R.S.C. Ord. XXXI, made in April, 1949; page 413, n. 2, the *Law Quarterly Review* has not yet reached 490 volumes!; page 628, the lady in *Dann* v. *Hamilton* [1939] was not a passenger in a bus, as the text implies, and the reference to the report in the Law Reports is incorrectly given.

The following are some suggestions for the improvement of the book in the next edition. The English practice of using square brackets in the citation of cases ought to be adopted. More attention should be paid to the general lay-out of the book, especially the paragraph headings. In some instances they are misleading, see, for example, the heading to paragraph 4, page 487, Test of Probability or Foreseeability, when the paragraph is mainly concerned with *Re Polemis*. The cross-references should be to page number and not to paragraph number; see, for example, the reference on page 42, n. 2, which refers to Chapter I, paragraph 24, which extends over four pages, when the point involved is to be found on one of them, page 37. The references to standard textbooks should be to the latest edition; see, for example, page 3, n. 4, and page 495, n. 7. It is unsatisfactory to be referred to the Third Edition of the author's book for a discussion of *Stanley* v. *Powell* and *Holmes* v. *Mather* (page 42, n. 3), and one cannot fairly deal with accident as a defence in tort in the space of eight lines (page 604). At page 559 there is no mention of agency or partnership as giving rise to vicarious liability, and we are left in doubt as to the author's views on this matter.

One may sum up by saying that the book ought to be of great value if used with discrimination. Law teachers and practitioners would do well to study it carefully, but it can hardly be recommended with safety for any but the brightest students.

J. E. Hall Williams.

An Outline of Local Government and Local Finance. By Sir Cecil Oakes, c.b.e., and W. L. Dacey, ll.b. [Sweet & Maxwell, Ltd. 1950. xv and 497 pp. £2 5s.]

Local Rates. By J. H. Burton. [Stevens & Sons, Ltd., "This is the Law" Series. 1950. x and 90 pp. 4s.]

The first of these books is the ninth edition of *Wright and Hobhouse* which last appeared in 1937. The authors observe in their preface that local government has in the intervening thirteen years undergone "what can almost be described as a metamorphosis." In fact, the shape of local government is, unfortunately, almost the only aspect which has not changed. But certainly no book on the subject written before 1945 has much value today. The new edition is full and detailed. Its outstanding virtue is accuracy and I find myself unable to append the usual list of minor errors inserted by reviewers to improve any subsequent edition. Occasionally the meaning of the text is not clear at first reading but in almost every case this is the result of compression for which it is difficult to blame the authors. The footnotes are not inserted, as is often the practice, to introduce subtleties or throw doubts on the accuracy of statements made above. Instead they frequently contain valuable additional information, such as the names of the boroughs for which stipendiaries have been appointed under the Local Government Act, 1882 (p. 24), the names of the county boroughs (p. 28), of counties of cities and counties of towns (p. 29), the names of the counties which in 1948–9 qualified for the application of the sparsity factor under the equalisation grant (p. 427), and the number and distribution of acres acquired for small holdings (p. 253);

many other examples could be given. A chapter on Negotiating Machinery in Local Government is almost the only and certainly the fullest account that has appeared anywhere.

For the teacher and student, this book at once invites comparison with Hart's *Introduction of the Law of Local Government and Administration.* There is room for both, but the comparison reveals how much each book omits. *Hart* is avowedly concerned with "the law"; *Wright and Hobhouse* is not. More accurately, *Hart* devotes more space to the law made by the courts and *Wright and Hobhouse* more space to the law made by Parliament and the Administration. *Wright and Hobhouse* provides no Table of Statutes; they are often referred to in the General Index but without reference to sections. Most revealing of all is the Table of Cases. Twenty-three cases find a place; of these, thirteen were decided before 1920. Two post-1945 cases are cited: *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corp.* (1948) and *Middlesex C.C.* v. *Miller* (1948). Most remarkably, of the cases cited, only two or three can be called leading cases on local government law. No one is to be blamed for writing a book on some aspect of public administration without reference by name to any case; to refer to three hundred or more cases is likewise excusable; but to refer to twenty-three cases and those neither the most important nor the most recent seems to indicate a certain indecision. Moreover, the result has been that the effect of many cases has not been incorporated in the text so that the story, as told, is incomplete. For example, none of the "natural justice" cases is quoted or incorporated; the procedure with which they are concerned is therefore inadequately described. Again, the section of the book on Local Finance covers 62 pages. No case is mentioned. A lawyer who reads an account of the district audit feels a sense of loss if the names of Roberts and Hopwood do not leap italicised from the page. This weakness of lawyers for the old familiar faces need not, indeed, be pandered to. But when there is no incorporation in the text of the effect of this and other more vital cases, the text is incomplete. The further question, how far some legal knowledge is necessary to those who write books on administrative powers and procedures, is clearly not relevant to the book written by these two learned authors. The result is that the law student cannot be directed to this book in the first instance though he will gain much benefit from it later; for non-lawyers the book is admirable but they should be warned that there is often something to be added.

To apply these arguments to the second book under review would, despite the title of this well-known series, be unfair. Moreover, the author cites many cases (which are not indexed) as examples. He sets out the complicated provisions in a straightforward manner, and succeeds, at times despite himself, in attaining clarity—"despite himself" because such sentences as these occur: "In normal cases, somebody, whom many vigilant rating officers contend is enjoying beneficial occupation of a kind which equitably makes him liable for rates thereon, is shown to be legally liable, if possible." "Rates are not taxes and vice versa, though the terms are often used loosely." The print is very small.

J. A. G. GRIFFITH.

PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW. By W. FRIEDMANN, LL.D. [Cambridge University Press as agents of Melbourne University Press. 1950. 112 pp. 12s. 6d.]

THIS book is a welcome addition to the rather scanty literature on Administrative Law in the common-law world. It provides a lucid elementary summary of Australian administrative law.

The English reader will find many interesting points of difference between Australian and English administrative law. Unfortunately, authority for some

of them is not cited, *e.g.*, that there is an implied right to legal representation before administrative tribunals (p. 106), and that vocational tribunals must give reasons for their decisions "even when it is not specifically stated" (p. 111). In the chapters on judicial remedies against the Administration, many important matters are not dealt with, *e.g.*, what interest has to be shown by an applicant for a mandamus; jurisdictional fact; error on the face. Inaccuracies include these: *Westminster* v. *L.N.W. Ry.* is cited as an authority on by-laws (p. 38); a quotation on statutes binding the Crown is wrongly attributed to the *Magdalen College Case* (p. 44–45); of *Metropolitan Police District* v. *Tatum* [1948] 2 K.B. 68 it is said that "the learned judge assumed as a matter of course that this was a case of 'loss of services'" (p. 57) whereas he said "here the claim is not based on loss of services" (pp. 72–3) and decided the case solely on quasi contract. We are told that in *Spark* v. *Edwards Ash, Ltd.*, strong opinions are expressed that regulations cannot be held bad for unreasonableness (p. 32); that the Crown Proceedings Act exempts the Crown from liability for "the maintenance of the armed forces of the Crown" (p. 53). It is said that the *Amphitrite Case* held "that petition of right will lie only in respect of commercial contracts" but *Robertson* v. *Minister of Pensions* is omitted; there is a reference to the Public Authorities Protection Act, 1893, but none to s. 21 of the Limitation Act, 1939.

H. Street.

Copyright and Industrial Designs. By A. D. Russell-Clarke, of the Inner Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1951. xv and 261 pp. 37s. 6d.]

The main advantage of this book is that it embraces all branches of copyright including that of industrial designs which, because of the accidents of legislation, has hitherto tended to be treated as a branch of patent law rather than of copyright law to which it more properly belongs. The separation brought about in 1949 by the Patents Act and the Registered Designs Act of that year renders this book particularly timely. It consists of three parts and a brief historical introduction: copyright under the Act of 1911, registered designs under the Act of 1949, and a discussion of the inter-relation and overlapping of the two codes. The second part is virtually a second edition of the learned author's earlier work on Registered Designs which appeared in 1930.

While the book undoubtedly contains a considerable amount of useful material, particularly in the parts on Designs and on the overlapping between them and copyright under the Act of 1911, the treatment in general seems somewhat slight for a practitioner's textbook. This is particularly noticeable in the chapter on Publishing Agreements which is potentially most useful but which is insufficiently comprehensive to be an adequate guide. The treatment, too, is marred by the learned author's habits of over-statement and inconclusiveness; examples occur at p. 30 (*noms de plume* are not *necessarily* the property of authors themselves rather than the journals for which they write), p. 37 (copyright in a whole work is not destroyed merely because it contains a libel) and p. 130 ("If a manuscript is used for a purpose other than that for which it was submitted, such use may amount to a breach of confidence." Obviously, but with what consequences? The author does not say.).

It would have been helpful if, in Chapter 3 when considering the position of American authors regarding copyright in England, something had been said about the converse case of an Englishman's position regarding copyright in the U.S.A. True, this is not a question of English Law, but it is of vital importance to the English author and one upon which he is likely to seek for guidance from his English legal adviser. At places, too, the arrangement seems confusing; for example, *Corelli* v. *Gray* seems to have little to do with

the scope of Dramatic Copyright (under which it is considered at length at p. 42) but to concern solely the question of Infringement (under which it is in fact also dealt with briefly at p. 75).

A serious inconvenience to the average practitioner is the fact that cases reported in the R.P.C. (which only specialists are likely to have available) are cited only under that reference, even although they are also reported in one of the general series. This inconvenience is increased because dates of cases are not given (unless the dates form an integral part of the reference, which they do not in the case of R.P.C.) and the Table of Cases gives no references at all. It is to be hoped that this false economy will be corrected in any later edition. If this is done and the general treatment is made more comprehensive this book should form a useful addition to the lawyer's bookshelves.

L. C. B. GOWER.

THE PATENTS ACT, 1949. By The Chartered Institute of Patent Agents. [London: Sweet & Maxwell, Ltd. 1950. vii and 327 pp. £1 17s. 6d.]

A GOOD commentary to an Act of Parliament should fulfil the following requirements:—

(i) It should state the significance of each individual section.
(ii) It should explain any parts in the section which are not clear on their face.
(iii) It should refer to any other section in the Act or in any other statute which restricts or otherwise affects the section under review.
(iv) It should refer to the Rules and Orders regulating the procedure or other details under the section.
(v) In the case of an amending or consolidating Act it should briefly draw attention to the differences in the old and the new Act.
(vi) It should cite all decided cases relevant to the interpretation of the section.
(vii) It should give the commentator's view on the correct interpretation of the section on questions not yet decided by the court.
(viii) It should give advice to the reader on how best to draft agreements, claims, or other documents governed by the section or to prepare and conduct legal proceedings controlled by the section.

The commentary on the Patents Act by the Chartered Institute of Patent Agents fulfils some of these requirements, but falls short in others. It states the significance of the individual sections of the Act and explains them where necessary. It contains references to other sections of the Patents Act and to Statutory Rules, Orders, and Instruments governing the procedure under the respective sections of the Patents Act. Differences between the new provisions in the Patents Act, 1949, and the old law are set out in very great detail.

On the other hand, in the commentary references to decided cases are few and far between. This is a serious omission because the significance and effect of many of the provisions of the Patents Act, 1949, can be understood only by reference to case law, and numerous cases decided under the old Acts are still good law under the Patents Act, 1949. For example, the definition of "invention" as a "manner of manufacture" in section 101 is meaningless without reference to cases such as *Rantzen's Application* (1947) 64 R.P.C. 63, deciding that the generation of wireless waves having particular characteristics is a patentable manner of manufacture, or *Fishburn's Application* (1940) 57 R.P.C. 245, deciding that the arrangement of words on a printed ticket or

coupon is not a patentable manner of manufacture. These and other relevant cases are not mentioned in the commentary to section 101. The same applies to leading cases of importance to the interpretation of numerous other sections of the Act which are not cited in the commentary.

In a book compiled by members of The Chartered Institute of Patent Agents, with the assistance of members of the Bar, the reader would have been grateful to find advice on the filing of patents, the drafting of claims, the conduct of proceedings before the Patent Office, the preparation and conduct of infringement actions, etc., which goes beyond a mere summary of the provisions of the Act and the Rules. In a footnote to section 67, which deals with the reference to the Comptroller of disputes on infringements, the advice is given that the agreement containing the terms of reference should deal with the matter of security for costs. Otherwise the instances where the great wealth of knowledge and practical experience of the joint authors is made available to the reader are rare.

The important problem to what extent the Patents Act recognises a monopoly for inventions on food and medicine under section 10, and restricts it by compulsory licences under section 41, is hardly dealt with in the commentary to either of these sections.

While the book under review is rather barren from the point of view of jurisprudence, case law and fundamental problems of patent law, it is an excellent work from the practical point of view. Patent agents, counsel, solicitors, as well as judges and officials of the Patent Office will find in it all routine information they need, such as the text of the Patents Act, the Patents Rules, the Patents Appeal Tribunal Rules and the Tribunal Fees Order, the Rules of the Supreme Court, as far as they affect patent procedure, the Register of Patent Agents Rules, and a number of other Statutory Rules, Orders and Instruments concerning the patent law. There is a good Index, the book is well printed and bound, and is likely to stand up to hard wear by the busy practitioner. A commendable feature is space after each section for memoranda to be entered by the user. In fact, apart from citations of decided cases, the work contains everything that can be desired in a reference book on patent law intended for daily use. The reviewer can testify that within the short time since its appearance he has seen it frequently, not only on the book-shelf, but actually in use on the desk of many a practitioner in the patent field.

Peter Meinhardt.

The Law of Master and Servant. By F. R. Batt. Fourth Edition. By J. Crossley Vaines. [Pitman. xxxvi and 520 pp. 30s.]

A new edition of *Batt* is a welcome arrival for teachers and students of employment law. Of all the comparable works in this field, *Batt* is easily the most readable. The present edition maintains the high proportion of statute law of its predecessor, which is no more than a symptom of the times and proper. While by lovers of case-law the common law of master and servant may be regarded as the heartland of employment law, that area is in relative terms constantly diminishing before the contemporary need for an increase in the production of legal rules which is equally as important as the need for an increase in the production of commodities.

Mr. Crossley Vaines' edition brings the law down to the latter half of 1949. Its scope includes the relevant contract, tort and criminal law, and reference in sufficient outline to legislation regarding truck, shops, minimum wages, welfare, factories, disabled persons, reinstatement in civil employment, essential work, social insurance and the now historic controversial "Order 1305." The National Insurance (Industrial Injuries) Act, 1946, is discussed in

two full chapters at what is probably excessive length for a work of this character.

By way of constructive criticism, I would list the following comments on matters of detail. The duty to provide work and the right to work (43, 85) deserve a larger treatment than that accorded them, especially in the context of a full employment economy, and with the citation of *Collier* v. *Sunday Referee* (85) should go that of the more recent *Hall* v. *British Essence* (1946) 62 T.L.R. 542. With regard to contracts not to be performed within a year of their making (45), the rule in *Donellan* v. *Reed,* and the reason why that rule was not applied in *Reeve* v. *Jennings* (45), are left unclear. Again, it is, I think, worth mentioning as illustrative of the dynamic situation of the law that the revised social attitude towards domestic servants today might well lead the courts to condone the housemaid's fulfilment of her moral obligation in *Turner* v. *Mason* (61).

The treatment of the effect on paying wages during illness of the receipt of injury or sickness benefit (75–6) is not altogether satisfying. In *Marrison* v. *Bell* (75) the Court of Appeal distinguished the effect of the Workmen's Compensation Act, 1925, and of the National Health Act, 1936, not only on the ground stated in the headnote and repeated in *Batt* but also in the light of the different principles and purposes of the Acts (*cf.* [1939] 2 K.B. at 204). There would, moreover, seem to be implicit in the Court of Appeal's judgment the fact that an important, if not vital distinction lies in the different financial sources of the compensation under the 1925 and benefits under the 1936 Act, for, in the one case, the employer paid the entire compensation, whilst, in the other, the employee contributed to the central fund twice as much as the employer. It is this distinction that may well prove decisive in any future case involving the National Insurance Act, 1946. At p. 76, line 6, it may be noted, the use of "payment" instead of "absence" is required to give full meaning to the sentence.

Some additional points remain. I think to say that the House of Lords in *Mersey Docks* v. *Coggins and Griffiths* "adopted" (300) the test of control laid down in *Donovan* v. *Laing* is not quite as exact as to point out that the House in fact continued the *development* of the rule in *Donovan.* A discussion of *volenti* (342–5) demands today a summary of the statement of the Court of Appeal in *Bowater* v. *Rowley Regis Corp.*, which underlines the exceedingly limited possibilities of the defence of *implied* consent in employment cases. Furthermore, the special subjective test of contributory negligence that has, since *Caswell* v. *Powell Duffryn,* been used in employment cases merits far greater emphasis than is given to it (347–9), for it strikingly manifests a privileged position conferred by the modern courts on, particularly, industrial employees in deference to the real conditions of continual risk in which they work.

Throughout the book there appears to be only one serious omission. There is no reference at all to the defence to breach of statutory duty of "delegation of duty," the invocation and interpretation of which has been considerably stimulated by the Contributory Negligence Act, 1945, and which is embodied in the line of cases from *Vincent* v. *Southern Ry.* [1927] A.C. 430 to *Beal* v. *Gomme* (1949) 65 T.L.R. 543. The Court of Appeal decision in *Lavender* v. *Diamints* ought to be cited as well as the decision at first instance if only because Tucker L.J. (as he then was) expressed reservations regarding the relevant proposition in *Batt* (347): [1949] 1 K.B. 585, 592. In the pages devoted to the duty to provide a safe system of work (332 *et seq.*), *Dyer* v. *Southern Ry.* [1948] 1 K.B. 608 deserves a place since it involves the system relating to work that is, quantitatively, of considerable importance. And *Holt* v. *Rhodes* occurs at p. 334 in *Batt,* and not, as stated in the Table of Cases, at p. 478, which is its page in [1949] 1 All E.R.

It ought, I think, to be common form in modern legal textbooks for all or the main case references to be included in the Table of Cases, and a

reference to "(Pollock's *Contracts*)" which is to be found in *Batt* (94, n. 1) must, I fancy, be viewed as sub-standard. Also, as is regrettably common, references to articles like N. S. Marsh's "Severance of Illegality in Contract" (64 L.Q.R. 230, 347), or those of Dr. O. Kahn-Freund and W. A. Lewis on *Hivac's Case* (9 M.L.R. 145, 280), which are germane to the subject-matter of *Batt*, and contain interesting and useful discussions within a small compass, are conspicuous by their absence.

Turning aside from these criticisms which are offered for the learned editor's consideration, it is good to see that common employment has been boldly lifted out of the body of the book and outlined by the learned editor in an able excursus; and, finally, it is to be hoped that Judge Batt will implement his offer in the Preface to include in the next edition, out of the rich store of past experience that lies deposited in the workmen's compensation cases, a selective analysis of the case-law that remains of value to us in understanding the new statutory provisions.

C. Grunfeld.

Lewin on Trusts. Fifteenth Edition. By Ronald Cozens-Hardy Horne, of Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1950. clxxvii and 886 and (index) 124 pp. With First Supplement (to January 1, 1951), by Miss B. K. Searle, Barrister-at-Law. iv and 10 pp. 105s. net.]

Lewin is a good example of a practitioner's book which is becoming more unmanageable with every succeeding edition. A large body of material is being superimposed on a structure which cannot bear it. The need is for reorganisation, revision and much rewriting—a drastic pruning of archaisms and a resulting concentration of effort on modern developments. It is hoped that there will be a policy of cutting out the dead wood in the next edition, and the book will emerge from vigorous treatment more readable, more accurate and more wieldy.

The present edition does not carry out such a policy, but within its limits it appears to be well done, though one cannot give it unqualified approval. To begin with, Chapter I, The Definition of a Trust, is completely archaic: the definition of a trust does not begin and end with Coke. On p. 25 it seems to have been overlooked that since the Crown Proceedings Act, 1947, an action, not a petition of right, is available against the Crown. On p. 40 on the question whether the proceeds of sale of land held in trust for sale are within section 53, L. P. A., 1925, *Re Price* [1928] Ch. 579; *Re Kempthorne* [1930] 1 Ch. 268, and *Att.-Gen.* v. *Public Trustee* [1929] 2 K.B. 77 are mentioned, but *Re Harvey* [1947] Ch. 285 is overlooked. On p. 41 *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 206 is cited, but *Bannister* v. *Bannister* [1948] 2 All E.R. 133, is not mentioned. On p. 53 it is said that "since debts and legal choses in action have been made transferable at law, questions under this head" (*i.e.*, the voluntary equitable assignment of a legal chose in action) "will be of less frequent occurrence". Experience has clearly proved this to be wrong. See *Re Fry* [1946] Ch. 312, *Re Rose* [1949] Ch. 78, *Holt* v. *Heatherfield Trust, Ltd.* [1942] 2 K.B. 1, none of which are cited in the book, and *Re McArdle* [1951] 1 All E.R. 905, which has recently been decided by the Court of Appeal. On p. 54 it is stated that a voluntary deed assigning a promissory note is valid notwithstanding the absence of indorsement, and *Richardson* v. *Richardson* L.R. 3 Eq. 686, is cited in support, and the reader is warned to see *Richard* v. *Dellridge* L.R. 18 Eq. 11. But the remarks of Jessel M.R. in the latter case make it very doubtful whether *Richardson* v. *Richardson* can still be regarded as good law, and it is suggested that the

case should be treated with a great deal more suspicion than it is accorded in the text. On p. 58, note (*x*), *Fletcher* v. *Fletcher* 4 Hare 74, is cited for the proposition that "a voluntary covenant to pay a sum of money to A in trust for B has been allowed to create a debt in favour of B," but none of the variations of this type of case as exemplified in *Harmer* v. *Armstrong* [1934] Ch. 65, *Re Schebsman* [1944] Ch. 83, and *Vandepitte's Case* [1933] A.C. 70, is discussed. On p. 433 the relegation of *Re Brockbark* (*sic*) [1948] Ch. 206, to a footnote is surprising in view of the fact that the decision is important in illustrating the limitation of the power of beneficiaries, even if *sui juris* and absolutely entitled, to control the discretion of trustees. Again, though there is much discussion of *Keech* v. *Sandford* 2 W. & T.L.C. (9th ed. 648) and *Re Biss* [1903] 2 Ch. 40 (pp. 156–7), there is no mention at all of *Re Knowles' Will Trusts* [1948] 1 All E.R. 866. On p. 76 *Shelley* v. *Shelley* L.R. 6 Eq. 540, is cited to illustrate the interpretation of precatory words in a will, but a recent case which followed it, *Re Steele's Will Trusts* [1948] Ch. 603, is omitted altogether. On p. 381 *Re Wellsted's Will Trusts* [1948] W.N. 210, is cited for a proposition which is not law, though on p. 606 account is taken of the Court of Appeal decision [1949] Ch. 296, and mention is made of the fact that the decision of Vaisey J. was reversed. On p. 721 the reference to "quasi-fiduciary" to describe the position of the charities in *Re Diplock* [1948] Ch. 465, appears to be unnecessary, but as it stands it surely requires expansion and illustration. And though the old law on section 8 of the Trustee Act, 1888 (period of limitation of trustee's liabilitity) is fully stated, *Re Landi* [1939] Ch. 828, and *Re Milking Pail Farm Trusts* [1940] Ch. 996, are inexplicable omissions from the section dealing with the Limitation Act, 1939 (pp. 821–2).

In conclusion, therefore, one can say that the present edition of *Lewin* is not as valuable as it might have been, but it remains the repository of monumental learning, of practical scholarship, and the *sine qua non* of research in the law of trusts.

O. R. MARSHALL.

A PRACTICAL EPITOME OF THE DEATH DUTIES. Second Edition. By DAVID HARRISON, LL.D., of the Estate Duty Office, London. [Sweet & Maxwell, Ltd., and W. Green & Son, Ltd. 1951. xx and 395 pp. (index 40 pp.). 37s. 6d. net.]

SINCE the first edition of this admirable work was reviewed at length on its appearance ten years ago at 5 M.L.R. 283, this notice will be confined to changes made in the current edition.

In the first place the repeal of the Legacy and Succession Duties by the Finance Act, 1949, has enabled the learned author to reduce the chapters on these duties, which occupied well over a hundred pages in the original edition, to a single short chapter (IX), Obsolete Duties. The space saved has been very profitably devoted to verbatim extracts from the many statutes, dating from 1894, relating to the Death Duties. This rearrangement has enabled Dr. Harrison to clear, to a very great extent, the text of his commentary from the quotations from these statutes which somewhat hindered the easy reading of the first edition; this is a great improvement.

The general plan of the earlier edition has been maintained by Dr. Harrison, but his task in weaving into the text all the changes both in statute and in case-law during the last ten years has been by no means easy as can be appreciated from the fact that no fewer than nine Finance Acts had to be considered. This has meant, in parts, a complete rewriting of the text—see especially Chapter I, section 5, Benefits from Companies.

The Appendices include, in addition to the Statutes, the relevant Rules of the Supreme Court and the Statutory Rules and Orders relating to Land

Values Appeals and the Double Taxation Conventions. The Table of Cases would be much more useful if it set out the various series of law reports; as it stands, there is but a bare note of the page where the case appears and the footnote there has only one reference, normally that of the Law Reports.

This work is emphatically not one for the student, but it should prove a valuable addition to the library of the busy practitioner. Scottish lawyers have not been overlooked, for, with the able assistance of Mr. R. A. Grieve, B.L. of the Estate Duty Office, Edinburgh, Scots law has been incorporated where it differs from English law, see, for example, the note at p. 52, Joint Holdings under Scottish Law.

A. Farnsworth.

Factory Law. By H. Samuels. Fifth Edition. [Stevens. xxviii and 719 pp. £3 3s.]

The principal occasion of this latest edition of Mr. Samuels' work was the Factories Act, 1948. As in the case of the 1937 Act, a lucid introduction prefaces the sections of the new Act with their attendant commentary. In addition, the regulations passed under the 1937 and 1948 Acts are given in full, and the comments on the 1937 Act brought up to date.

From the absence of *Burns* v. *Terry* [1950] 2 All E.R. 987, reported in November, 1950, it may be concluded that the new edition brings the law down to the last quarter of 1950. In this carefully prepared publication, the sole omissions discernible are *Schwalb* v. *Foss* (1946) 175 L.T. 345, in relation to the meanings of regs. 17, 19 and 23 (iii) of the Woodworking Regulations, 1922, *Green* v. *Hilger* (1946) 90 S.J. 529, concerning section 14 of the 1937 Act and the application of the rule in *Nicholls* v. *Austin* [1946] A.C. 493, and, in relation to the defence of delegation of duty, *Massey* v. *Lingwood* (1945) 89 S.J. 316. Finally, the case in 83 Ll.L.R. 1 is not "*Chatham*" but *Chatburn* v. *Manchester Dry Dock*.

As the learned author points out in his Preface, the Table of Cases now cites all the reports, and tables are included of the relevant statutes and statutory instruments. These render yet more efficient a book that is of standard reference for all practitioners, teachers and students, and a pleasure to handle.

C. Grunfeld.

Private International Law. By Martin Wolff. Second Edition. [Oxford: at the Clarendon Press. 1950. xlviii and 631 pp. 35s.]

This work possesses many of the qualities which are believed to rouse the immediate dislike of the common lawyer: it stresses the theoretical foundations of the law, it subjects the English rules of Private International Law to comparison with foreign rules, it deals with the law as it should be no less than with the existing law, and, most significant of all, it is not afraid to dwell at great length upon hypothetical questions. It has yet succeeded as shown by the publication of this second edition. This success, therefore, calls for congratulations not only to the author, but also to the English Conflict of Laws, which has attained sufficient maturity to absorb the wealth of learning and of legal wisdom contained in this book.

The author's mastery of the techniques of English law is shown in the manner in which the new developments have been incorporated in this edition. Thus there is a full account of *Re Bischoffsheim*. The heavy criticism to which this decision has been subjected is effectively met by pointing out that the

English *lex successionis* is only relevant to explain that "children" means legitimate children and that it does not provide the answer to the question how to determine legitimacy. Again, *Lorentzen* v. *Lydden* is given the detailed attention it requires (especially on page 528). Dr. Wolff prefers to treat this case as one of expropriation (requisition might be a better term) as distinct from confiscation. It might have been relevant when dealing with the "new and rather dangerous conception of public policy," which formed one of the three alternative bases of this judgment, to draw attention to the not dissimilar provision of the Bretton Woods Agreement (Article VIII, 2 (*b*)), which demands invalidation of contracts violating the exchange control laws of a member regardless of whether the legal system which has been violated is to be applied under Conflict of Laws rules. This Agreement is duly noted (on page 474) but no comment is offered on its rather defective drafting.

In the course of a thorough revision of the first edition, the author has corrected the few anachronisms which it contained. Thus, on page 109, the Serbian who marries in Paris has been replaced by a Greek; but "Palestine" is still referred to as a political entity (on page 6), and (on page 315, note 1) Soviet law is stated as still allowing divorce by unilateral and arbitrary declaration.

Dr. Wolff now qualifies his support of Sir Eric Beckett's view that the question whether a marriage is polygamous or not must be decided by the *lex loci celebrationis*. The situation described on page 320 which is meant to demonstrate the need to consider "all the circumstances of the case," in effect allows the intention of the parties to characterise the marriage, a view rightly rejected on page 318. The monogamous character of a marriage between Scottish people in Pakistan can only be asserted if the law of Pakistan permits monogamous marriages. The rule that a marriage is polygamous even if it is only potentially so is now qualified by the unconvincing suggestion (on page 317) that Jewish marriages in North Africa should only be considered polygamous where a second wife has, in fact, been taken. *Seedat's Case* is criticised because the South African judge wrongly believed that the English test, which looks to the polygamous potentialities of a marriage, had been generally adopted. It would, however, seem more important to point out that the reasons given in that case to deny rights of succession to the first wife ignored the distinction between recognition and enforcement of polygamous marriages, a distinction explained (on page 183) in the terms of Niboyet's doctrine of the degrees of intensity of *ordre public*.

The valuable survey of Matrimonial Property Systems (on page 355 ff.) has now been enlarged by the addition of a new type of "Systems of community upon death." There is an important logical link between matrimonial property law and restrictions on the freedom of testation imposed to protect the family (this seems to be overlooked by the critics of *Re Cooke's Trusts*). But, although connected, the two subjects remain independent. Dr. Wolff uses this new type of matrimonial régime to argue against Dr. Cheshire's view that *Lashley* v. *Hog* was a case turning on testamentary rather than on matrimonial law (page 361). It seems equally unconvincing to treat *legitim* restrictions as a matter of matrimonial rather than testamentary law.

On the subject of nullity of marriage Dr. Wolff no longer maintains, as in the first edition, that a distinction between void and non-existent marriages "is to be found also in English law." With characteristic elegance and economy he now concedes that this is only true of "early English law" (page 80). The implication of this concession appears in the discussion of the domicile of married women. It is now admitted that a void marriage does not change the woman's domicile. This follows from the decision in the *De Reneville Case* which might have received more ample attention. There may be merits in treating the distinction between non-existent and void marriages rather than that between void and voidable marriages as relevant to the domicile of married women. On the other hand, it seems inconsistent to attack (see page 122) the

rigorous adherence of English law to the principle of unity of domicile between husband and wife and to complain of the independent domicile under a void marriage. As for the criticism of the principle of unity, and also of the imperative *locus regit actum* rule in relation to the formalities of marriage (page 343), it must be remembered that these doctrines possess the important, if not decisive, merit of reducing uncertainty which (on page 104) is said to be one of the principal defects of the English conception of domicile.

The discussion of adoption incorporates the changes resulting from the Act of 1949. The author here has relaxed his requirements for the recognition of foreign adoptions. He has, perhaps, not moved far enough in this direction. It must be remembered that there remains the ultimate safeguard of public policy, which is in this context easily identified as concerned principally with the welfare of the infant, see section 5 (1) (*b*) of the Adoption Act, 1950. There are also now statutory restrictions against sending infants abroad for adoption (Adoption Act, 1950, ss. 39, 40). These restrictions constitute by implication some statutory basis for the recognition of foreign adoptions so that it is perhaps no longer entirely accurate to maintain that "the Act is silent on this point" (page 400).

Dr. Wolff has remained an uncompromising defender of the proper law determined "subjectively" by the choice of the parties. The recent controversy conducted by Dr. Mann and Mr. Morris in the *International Law Quarterly* has increased the, admittedly academic, interest of the subject. It may, perhaps, be remarked in passing that both the learned disputants seem to have paid insufficient attention to the distinction between contracts containing an express or implied choice of law and those where this matter has not been considered at all by the parties. Mr. Morris's contention that the proper law should be determined objectively is particularly convincing if confined to the latter kind of contracts, and, indeed, the modern developments in the English law of Contract which he cites to demonstrate the growing tendency to eliminate fictitious terms, only support his view as far as the latter kind of contract is concerned. Dr. Wolff is rather more conciliatory on this point than Dr. Mann, since he claims for the subjective formula no more than the purely psychological merit of compelling the judge to "visualise the actual parties when determining the proper law." To meet the more extravagant claim of Mr. Morris and the arguments advanced by him in support of the view that the objective test should be applied even where there has been a choice of law by the parties, Dr. Wolff might have drawn more fully upon his discussion of the matter in the *Juridical Review* (Vol. 49, p. 123), in particular in order to show that the agreement of the parties as to the proper law is only "an idea or conception" rather than a contract in the technical sense of internal law or Conflict of Laws.

Mr. Morris's argument that the Conflict of Laws cannot be used to determine the validity of the agreement choosing the proper law, where, for instance, this is attacked on the ground of fraud or mistake, is not met by Dr. Wolff's simple affirmation that the choice of law by the parties is given legal effect by a rule "forming part of the private international law of most countries" (page 414). But the answer to Mr. Morris is implicit in the solution to the example set on page 439 of a contract claimed to be concluded by silence under Scandinavian law. It consists in regarding the choice of the proper law not as a legal agreement but as a purely factual element which, in point of fact, is not established where there is either ignorance or fraud.

When discussing the practically more important problem how to limit the freedom of choice of the proper law, Dr. Wolff maintains, in accordance with the generally accepted doctrine, that the parties are always free to choose the *lex fori* (page 421). But it is *a priori* objectionable to claim any privileges for the *lex fori* in the Conflict of Laws. This explains the general disapproval of the decision in the *Sottomayor Case No.* 2, which is shared by the learned author who condemns it (on page 334) as "an unfortunate exception to the domicile principle." The logical basis of these objections to privileges for the

lex fori is that they violate what is described (on page 202) as "the chief aim of private international law: harmony of decisions irrespective of where the judicial proceedings take place." In connection with the choice of the proper law the concession to the *lex fori* is said to rest "not only on the natural inclination of every judge to apply the law of his country" (an inclination which should not be encouraged as it contradicts ultimately the purpose of the Conflict of Laws) "but also on the rule that parties to a contract can always agree to the jurisdiction of a foreign court." This appears to be equally unconvincing. The unsoundness of deducing choice of law rules from those concerning jurisdiction is now generally admitted (compare Fleming in 3 I.L.Q. 9, especially at page 12). Its danger lies again in that it leads back to the national law of the court. It cannot be the function of the Conflict of Laws to act as guide on these excursions into the interior. The final argument, that "the parties can by agreement make English law applicable by pleading that they agree that the foreign law is identical with English law," amounts to no more than making a virtue of necessity. The quality of this "emergency solution" is clearly analysed in the earlier chapter on the Application of Foreign Municipal Law. There (on page 222) the rule now used to justify privileged treatment of the *lex fori* is said to have the "low rank of an unavoidable though regrettable solution, raised . . . to the dignity of a presumption."

This point is characteristic of the difficulties into which Dr. Wolff is led by seeking to pursue two inherently incompatible aims: to impress the need for an internationalist outlook in this subject and at the same time to encourage a pragmatic and practical approach which mostly leads to the application of the national law of the judge. This contradiction does not necessarily constitute a source of weakness. The readiness to compromise principle with realism may well be claimed to be the essence of that legal wisdom which gives to this work its distinctive quality and which is certain to commend it particularly to English readers.

J. UNGER.

MONEY IN THE LAW NATIONAL AND INTERNATIONAL. By ARTHUR NUSSBAUM. [Brooklyn: The Foundation Press, Inc. 1950. 618 pp. $8.00.]

PROFESSOR Nussbaum's book is a new edition of his *Money in the Law* published in 1939 with substantial extensions of the subject into the international field. Though it is divided into two separate parts: The Law of Money in General and Money in the International Law, the whole volume deals mainly with world problems of money, giving the reader an ample choice of laws and decisions issued by tribunals in the main financial centres of the world. The author has made a serious effort to collect economic and financial material for the purpose of legal analysis; however, simultaneous legal and economic inquiry entails considerable risk. Such an approach may provoke objections from the traditional lawyer or economist who are not yet accustomed to co-operate constructively with each other. Professor Nussbaum's book constitutes a courageous attempt to overcome these difficulties and although he is not in every respect successful with the formulation of problems, his book as a whole is undoubtedly a major contribution to the development of international economic law.

In practice the method adopted by the author presents a few drawbacks. The economic material, which is the basis of legal analysis, is sometimes incomplete or submitted to the reader on the level of an elementary guide into economics. For instance, the gold standard is explained in simple definitions while its essential international implications are overlooked. The economic aspect of other problems is sometimes discussed in the text, while their legal

aspect is dealt with in footnotes only. Sometimes it is the other way round, and this obstructs the welding of legal and economic thought. While the author is fully aware of the differences between public and private law in relation to international problems (Part II), he overlooks the importance of this distinction in Part I. When speaking about the Notion of World Money, the author omits the discussion of the two major present-day efforts to create a world currency, those of Lord Keynes and Harry White in the pre-Bretton Woods Plans.

All these shortcomings are, however, of minor importance in view of the main achievement of the author in giving the reader a wealth of material on money and its behaviour in the national and international field. International lawyers will find in the book valuable explanation of the economic background of money, and economists may become aware of the importance of law for a better and more precise understanding of economic problems. Professor Nussbaum is right in saying that separation of economic and legal thought is too rigorous in Anglo-American learning. He has certainly shown new possibilities of constructive co-operation between the two disciplines.

C. H. Alexander.

Regimen Internacional de los Contratos. By Dr. Quintin Alfonsin. Professor of Private International Law in the Faculty of Laws, Legal Adviser to the Ministry of Foreign Relations. Biblioteca de Publicaciones Oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de Montevideo, Seccion III, LIV. [Montevideo: Republica Oriental del Uruguay. 1950. 190 pp.]

English and American reviewers of Continental legal works not infrequently criticise civilian writers for setting out what in their view the law should be instead of stating what the law is. If these critics were right, legal science would have to confine itself to the laborious, but supremely modest, task of collecting and systematising the snippets of thought falling off the judicial Bench with no more room for original work than an occasional suggestion for rounding off some rough edges or filling some very minor gap—all such suggestions to be made "humbly" and with a great deal of real or feigned diffidence. No doubt, the author of this work on the private international law relating to contracts would contemptuously refuse to subscribe to this view of the purpose of legal scholarship. Here is a work of some size on the private international law of contracts which not once refers to a decided case, which quotes only on very rare occasions any rule of codified law and which—incredible though this may seem to the adherents of the "state-the-law-that-is" school of thought—is yet of absorbing interest to anybody who is concerned theoretically or practically with the law of Conflict of Laws.

Professor Alfonsin does not attempt to state the law of Uruguay or of any other country as laid down in a Code or in judicial decisions. Nor does he try to describe the outlines of a comparative system. He has set himself the task of considering what doctrine would best cope with the legal, economic, political and logical problems resulting from the conflict of laws in the field of the law of contracts. In performing it he has boldly disregarded all the numerous points of detail, historical accidents, time-honoured traditions and political compromises represented by the actual legal rules adopted in the various countries. Instead of venturing into this maze of facts, fancies and fictions he has devoted himself to examining the various doctrinal solutions which have been proposed by Continental legal writers, in particular by French jurists, and discussed by various international bodies,

in particular the International Law Association and the Rome Institute for the Unification of Private Law.

He divides these theoretical attempts at solving the problem of the conflict of laws in the field of the law of contract into those which propose a national and those which propose an international solution. The former group on its part is subdivided into systems based on a single point of contact, such as the autonomy of the parties, and those which use several points of contact, requiring in every individual case an investigation, which point deserves preference in the instant case. The latter are referred to as "analytical systems," because of the analysis of the case which they require. The former group again either leaves the unity of the contract undisturbed, applying one and the same law to all its aspects, or splits the contract into two parts, applying one law to the rights and duties of one party and another to those of the other. The author discusses one after the other of these various solutions with admirable clarity. His conclusion is that the present tendency of the doctrine of private international law is to prefer a national analytical solution, such as that proposed by Baron Nolde in the Sessions of the Institut de Droit International at The Hague in 1925 and 1927, but that international commerce has already reached a stage of development where such a system, just because it does no more than rendering a national legal system applicable, begins to give insufficient legal protection. The author is, however, very sceptical of the possibility of unifying on an international level either the municipal law or the law of Conflict of Laws. In his view the future lies in the enactment of a dual legislation in each individual State: there is to be one set of rules for national contracts, while a separate set of provisions is to apply to extra-national contracts. This is, in the author's view, not only a stage of development which private international law is just entering in the course of its history. It is far more: it is the final stage beyond which there is no further goal to aim at.

Few of his readers will probably be able to follow Professor Alfonsin in this pessimistic conclusion. Some may even be inclined to question the accuracy of his diagnosis: the evidence in favour of the assumption that there is really a strong tendency for a double-track solution, such as he thinks of, seems to be rather slender. Here—more than in the doctrinal part of his book—Professor Alfonsin seems to have been misled by his exclusive preoccupation with the works and views of academic writers and associations. But the value of his book does not lie in either the diagnosis at which it arrives or the prognosis which it tries to justify. It lies in its clear analysis and sober criticism of the modern theory of private international law. The author might perhaps have made his book more useful and attractive to English and American readers by taking some account of English and American views and writers on his topic. Perhaps he has found that the literature of the common law countries is too much devoted to what Martin Wolff has called the "culling" of private international law "from custom, statutes, precedents and the requirements of the various human communities," and too little to the deontological problems which he had primarily in mind. But it is strange to see so well-informed a writer discussing the theory of the proper law of the contract without any reference to the writings of Cook, Lorenzen and Dean Falconbridge. Even though Nussbaum's remark that the "proper-law-of the contract" doctrine can be considered as one of the outstanding contributions of English learning to this field of legal knowledge, has rightly been dissented from by Dr. Morris, one cannot help feeling that this doctrine would well have deserved far more attention than it has found in Professor Alfonsin's book. The separation of legal thought in the civilian countries from that in the common law countries is perhaps nowhere more regrettable than in this field, where national habits and customs matter so little and needs and the means of achieving them are so much the same everywhere. The recent discussion between Dr. Mann and Dr. Morris would no

doubt have gained in both theoretical profundity and practical usefulness if it had not been so exclusively devoted to discussing arguments proposed in English and American writings. But Professor Alfonsin's book shows that insularity occurs even in a subcontinent whose legal literature is as a rule distinguished by a particularly broadminded cosmopolitanism.

E. J. Cohn.

A Manual of International Law. Second Edition. By G. Schwarzenberger. Published under the auspices of the London Institute of World Affairs. [London: Stevens. 1950. lii and 428 pp. 25s. net.]

Law, in a large way, is a process of correct reasoning, and what appears ultimately more important to a successful student of law is to be able to think and reason for himself, guided, as it were, by the experience of others. While this is true with regard to municipal law, it is particularly so with regard to international law, which operates in a highly dynamic society with frequent changes in the law (in particular, treaty law) and in the situation which the law governs. In this respect, Dr. Schwarzenberger's book is especially valuable in that it guides and stimulates the students to grapple with various problems for themselves, by outlining concisely, in Part I, the general principles of international law, and by setting, in Part II (The Study Outlines), numerous questions ranging from the simple to the controversial, with copious references, given under each question set, to relevant treaties, judicial decisions and literature where the answer may be found. The special features and merits of the book have already been noted by a previous reviewer of the first edition in this journal ((1949) 12 M.L.R. 395–6). The appearance of a second edition, in which the Study Outlines (an invaluable part of the book) have been thoroughly brought up to date, is much to be welcomed.

B. Cheng.

The Customs Union Issue. By Jacob Viner. [London: Stevens, for the Carnegie Endowment for International Peace. 1950. viii and 221 pp. and (index). 20s. net.]

This challenging study of a topical subject deals with the economic, political and legal aspects of customs unions, primarily from the point of view of the economist. The distinguished American economist is sceptical of the economic advantages of customs unions either for the participating countries or for world trade, and considers as unwarranted by experience a widely held belief that customs unions are conducive to closer political unions. The legal aspect of the book is concerned with the compatibility of customs unions or other preferential arrangements with the most-favoured nation standard. The seeming inconclusiveness of this part of the work is due no doubt in large measure to the very nature of the problem the solution of which depends much upon the circumstances of each individual case and the practice of individual States.

The book is the tenth and concluding number of the Carnegie Endowment's series of "Studies in the Administration of International Law and Organisation." It contains, besides a copious bibliography, a list, carefully compiled by the Endowment, of conventions, decrees, and other documents concerning customs unions, beginning with the German *Zollverein*. This list, which also gives the source references of these documents, all available in typewritten form in the Library of the Endowment, should be of much use to lawyers interested in the subject.

B. Cheng.

Income Tax Treaties. (The Income Tax Conventions of the United States with Great Britain, Canada and other countries.) By A. A. Ehrenzweig, Professor of Law at the University of California and Member of the New York Bar, and F. E. Koch, dr.jur., a.c.w.a., Certified Accountant. [Commerce Clearing House Inc., New York 18. 1950. 368 pp. and (index) 16 pp.]

This work is primarily written for American income tax practitioners but it should prove useful for those specialists in this country whose work is more concerned with the Double Taxation aspect of income taxation.

After a historical, comparative and analytical introduction to the subject, the learned editors annotate each Article of the U.S.A.–U.K. Double Taxation Convention by special reference to the tax systems of the two countries, so that a British or American practitioner, reading the annotation, is at once seized with the nature of the *other* system he is considering and with which he is not familiar. As an example the annotation of Article II (1 g and h), which deals with "Residence," covers some 15 pages (sections 61–71), and sets out the relevant statutory and case-law of each country together with the official regulations and interpretations relating to residence. This method is followed for the remaining Articles of the Convention.

Your reviewer has carefully examined the section with which he is most familiar, that relating to "residence," and he can report that it is fully adequate, all relevant statutory and case-law being embodied either in the text or footnotes, while the official regulations are quoted verbatim. He has no reason to suppose that the remaining Articles are not as adequately dealt with.

The U.S.A.–Canada Convention is also considered but by way of interpolation (clearly marked) in the text where its provisions on the relevant law differs from those of the U.S.A.–U.K. Convention. The bibliography extends to some 16 pages and the footnotes are a mine of information and learning. Mr. Koch, the co-author, wrote *The Double Taxation Conventions*, reviewed at 11 Mod.L.R. 119. This in itself should recommend the work to all in this country concerned with the impact of American taxation.

A. Farnsworth.

Domaine Public et Res Extra Commercium. By W. G. Vegting, Professor of Administrative Law in the University of Amsterdam. (Alphen: N. Samsom n.v. Paris: Recueil Sirey. 269 pp. and (Bibliography) 11 pp. and (Tables and Indices) 11 pp.]

The present book is a translation into French of Professor Vegting's work which first appeared in Dutch in 1946, and was engendered by differences in French and Dutch legal theory. The work is a study of the treatment of things devoted to the public use forming part of the *domaine public* in Roman, French and Dutch law, and of the theories which have been advanced on this topic. In the main the discussion follows the historical development. There is an exposition of the relevant Roman law followed by an account of the discussions of the topic from the time of Justinian to Pothier, and of the specific rules of law in France and the Netherlands both before and after codification. Finally there is an exposition of the law in force and current theories.

The main theme is the nature of the legal relationship of the State to things devoted to the public use—whether or not the State is to be regarded as proprietor—and the precise meaning of the phrase *res extra commercium*. Professor Vegting maintains that in Rome the State was regarded as proprietor, except in regard to *res communes omnium*, as was the Crown formerly

in France, the rules against alienation, etc., being designed to preserve the wealth of the kingdom and being in no sense derived from any special relationship between the Crown and the *domaine public*, but rather from the special position and purposes of the State. The reforms in France of 1790, which he discusses in detail, recognised he asserts this proprietorship. Yet from the nineteenth century he shows how in the courts and in writings, particularly in France, the State has ceased to be regarded as proprietor. This change he regards as mainly attributable to Proudhon and to a confusion springing from a misconception of the source of the rules against alienation and the like. Such rules he maintains did not mean that the State was not proprietor but had other roots already indicated. This process is doubtless accelerated by the increasing divergence between public and private law so that private law concepts are more easily avoided.

The theme may seem a narrow one, yet it has a general interest as one part of the problem of the special position of the State in law. Apart from that there are numerous sidelights of considerable interest, the whole question of inalienability and its collapse in effect, though it is true that contracts relating to the *domaine public* in France must generally be administrative with all the peculiarities which follow. Similarly matters such as the operation of prescription against such lands, the control of the central government over the domain of subordinate organs such as communes are of general interest. Some of these problems are strange to many English readers, others are here obscured by differences of the local law, nevertheless, in reading this book fresh light and fresh thoughts come even on domestic problems.

The book is not always easy to read, sometimes the very detailed care taken in its preparation makes it difficult but that care is nevertheless impressive, and it is a book which contains a great deal of interest. The tables and bibliography in particular are full and useful. If some effort in reading is required it is an effort which is well repaid. If a reviewer may confess that his ignorance of the topic, while not boundless, was considerable he may add that he at least has derived much pleasure and profit from the book.

J. D. B. Mitchell.

Hugo Black : A Study in the Judicial Process. By Charlotte Williams. [Baltimore : The Johns Hopkins Press. 1950. vii and 208 pp. Price 28s.]

Mr. Justice Black is one of the most controversial members of the Supreme Court of the United States. At the time of his appointment in 1937 his early membership of the Ku-Klux-Klan raised an outcry. It was in no way lessened by the fact that he stood by while, during the debates on his confirmation, Senators denied his membership, and admitted it only weeks later when his appointment was confirmed, and the evidence had become overwhelming; even Miss Williams describes his attitude during this period as "the nearest thing . . . to studied deceit," and her explanation that "he must be judged in the light of all the circumstances and as a man rather than a demi-god" (p. 67), is hardly apt to appeal to men. On the other hand, when in 1946 Mr. Justice Jackson thought fit publicly to attack his colleague on the (from the English point of view wholly tenuous) ground that he had taken part in the hearing of a case argued by a former partner, his dignified silence, as Miss Williams justly says, was indeed "to the everlasting credit of Justice Black's good sense and self-control" (p. 183). Altogether, a judicial career which opened with such misgivings, seems later to have provoked widespread satisfaction. At any rate, an English lawyer cannot help being greatly impressed by the character and language of some of Mr. Justice Black's opinions, which show no trace of the spirit of the Ku-Klux-Klan, but on the

contrary disclose a liberalism and respect for Equal Justice Under Law that is wholly in line with his court's great tradition.

Miss Williams duly emphasises this point in the course of her description of the contributions made by Mr. Justice Black to American legal thought and practice. Whether her study in fact achieves its purpose of assisting in "a general appraisal of the trend and temper of constitutional theory during a stormy decade," is a question which only an American lawyer can answer. A foreign observer must diffidently doubt whether the answer will be an unqualified affirmative. But, as Miss Williams herself realises, the time may not yet be to undertake, or even prepare for, that task.

F. A. MANN.

UEBER DIE OBJEKTIVITÄT DER RECHTSPRECHUNG. By OTTO BRUSIIN, Lecturer at the University of Helsinki. [Helsinki : J. Simeliusen Perillisten Kirjapaino Oy. 1949. 122 pp.]

DR. BRUSIIN'S essay is devoted to the interesting question what factors promote objectivity in the activities of courts of law. Unfortunately it cannot be said to have advanced the matter to any considerable extent. A problem of this kind can, of course, be dealt with on a popular level by enumerating and briefly discussing some of the institutions, rules, habits and customs which in one or more individual countries have assisted in promoting objectivity. But a scientific treatment of such a question demands infinitely more than that. It requires comprehensive comparative studies combined with an intensive fact research. Dr. Brusiin offers neither the one nor the other. The extent to which this omission has affected his work can be easily demonstrated. The lack of comparative research has led him to overlook entirely the work of the American realist school—a school which has made his very topic the centre of its legal thinking. It has made him write a sentence like this: "The principle of judicial independence is scarcely (!) weakened by the rule of the binding force of former decisions, provided the requirements for this binding force are laid down objectively in rules of law which are actually in force" (p. 20). The lack of fact research has deprived many of his references to individual rules and institutions of their real value. Thus he assures us that it is quite wrong to assume that the courts of the Soviet Union were not striving for objectivity. But the sole ground for this sweeping condemnation of a view adopted by more than one competent observer is an article in the *Constitution of the Soviet Union of 1936* (p. 33). No attempt is made at investigating the relationship between Soviet legislation, Soviet legal theory and Soviet legal practice. One can only regret that the author has not chosen a more realistic approach to his problem. If he had done so, he would have recognised that the conceptionalist introduction with which his book opens is quite unnecessary and, that, if a "theoretical" introduction was at all required, an investigation of the ethical meaning of objectivity, the psychological limits of achieving objectivity and the jurisprudential limits of its desirability would have been much more worth while than the dry and unconvincing propositions of his first chapter.

E. J. COHN.

OUTLINES OF MUHAMMADAN LAW. By ASAF A. A. FYZEE. [Calcutta : Geoffrey Cumberlege, Oxford University Press. 1949. xvi and 443 pp. 27s. net.]

THE reviewer has no special knowledge of Mohammedan law and this review, therefore, is that of a layman. He has read Professor Fyzee's book with great

interest and found it fascinating. It is, to a Western lawyer, a clear and very readable account of a new and, in many ways, strange subject. In this connection the historical introduction which gives an account both of the background and of the development of Islamic law is particularly valuable.

The subject is particularly interesting when viewed in relation to its sociological background and when viewed from the angle of comparative law. The fundamental problems to which any legal system must find the answers, are largely the same the world over, and a comparative investigation of family law, the law of succession or the law relating to wakf (an institution related to, but different from charitable trusts) should prove interesting and fruitful. This is true of the problems arising from the limits of the applicability of Mohammedan law in India also.

The reviewer lacks the knowledge to discuss the learned author's treatment of any individual topic, but the exposition appears to him lucid and as comprehensive as is suitable in an elementary work, and the book can be recommended as an introduction to a subject too little known in the West.

W. A. Steiner.

The Trial of Peter Griffiths. Edited by George Godwin. Notable British Trials Series, Vol. 73. [London: William Hodge & Co., Ltd. 1950. 219 pp. 15s.]

This is the trial of a twenty-two-year-old ex-Irish guardsman who, after stealing a girl of less than four years of age from her cot in a Blackburn hospital and criminally assaulting her with almost inhuman ferocity, eventually killed his victim by bashing her head against a stone wall in the hospital grounds. It is chiefly of interest as illustrating the working of the M'Naghten Rules in the courts at the present moment, a subject now under consideration by the Royal Commission for Capital Punishment.

The prisoner was admittedly of low intellectual capacity and there was a considerable amount of evidence which seemed to indicate that he was, by heredity, suffering from a serious disease of the mind, schizophrenia. Since he had, however, shown clear recollection of his actions, the defence found it extremely difficult to prove that he did not know what he was doing or that what he was doing was wrong, and the jury rejected the plea of insanity. In the Introduction Mr. Godwin, the editor, not unnaturally takes a poor view of the prevailing system which led to the execution of a man whom three of the four doctors, examined as expert medical witnesses, described as suffering from a defect of the mind. For this reason he has added, as an Appendix, a paper in which Dr. C. Stanford Read, Consulting Psychiatrist to the West End Hospital for Nervous Diseases, discusses "Schizophrenia and other mental disorders of medico-legal import." Dr. Read produces neither infallible symptoms for diagnosis nor a panacea for treatment of such abnormalities as are here involved, but what he says, though necessarily concise, is valuable as indicating the considerable progress which psychopathology has made in the past 100 years.

A strong case can, however, certainly be made against the present practice which, instead of calling for an impartial and objective expert report which the jury might consider like all other evidence, requires the defence to establish insanity by calling such medical witnesses as it can find. As a result, more often than not, two opposing sets of experts, one for the prosecution and the other for the defence, are seen, like in this case, wrangling in court over complicated problems of psychopathological science and putting forward conflicting hypotheses from which the jury must draw such conclusions as it can.

It is striking that this case which, with the first mass employment of finger-printing in this country (prints were taken from all males in the Blackburn area, 46,000 in all, and nearly ten million comparisons were made in

order to trace the murderer), marks an important step forward in scientific crime investigation, shows up, at the same time, some almost archaic traits of our substantive and procedural criminal law. Mr. Godwin opines that "the trial of Peter Griffiths may appear to the reader of this trial fifty years hence as strange as the records of the trials of the New England witches." He may be right.

H. A. H.

Books and other publications received :—

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Scintillae Lucis Concerning the Landlord and Tenant Act, 1927. A Supplement thereto. By L. G. H. Horton-Smith. [The Referees (Landlord and Tenant Act, 1927) Association. 5 Paper Buildings, Temple, London, E.C.4. 1951. 33 pp. 5s. net, post free 5s. 6d.]

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Covenants Affecting Land. By Sir Lancelot H. Elphinstone. [The Solicitors' Law Stationery Society, Ltd. 1951. Supplement up to September 22, 1951. 16 pp. 3s. 6d. net.]